

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - Diridon/DW - IHO Guidelines and Inclusionary Housing Reg Agreement - CPDB Comments 4-16-21
Date: Tuesday, May 18, 2021 11:24:31 AM
Attachments: [Redline - IHO Guidelines - CPDB 4-16-21 Comments to City 4-13-21 Comments.docx](#)
[IHO Guidelines CPDB 4-16-21 Comments to City 4-13-21 Comments.docx](#)
[Redline- Inclusionary Housing Reg Agreement - CPDB 4-16-21 Comments to City's 4-13-21 Draft.docx](#)
[Inclusionary Housing Reg Agreement - DW - CPDB Edits 4-16-21.docx](#)

From: Miller, Gregg <gmler@coblentzlaw.com>
Sent: Friday, April 16, 2021 10:44 AM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Subject: Google - Diridon/DW - IHO Guidelines and Inclusionary Housing Reg Agreement - CPDB Comments 4-16-21

[External Email]

Johnny: please see attached.

Gregg Miller

Coblentz Patch Duffy & Bass LLP

One Montgomery Street, Suite 3000

San Francisco, CA 94104

Cell: 415-939-3142 | Direct Dial 415-772-5736 | Office 415-391-4800

gmler@coblentzlaw.com

www.coblentzlaw.com

This transmittal is intended solely for use by its addressee, and may contain confidential or legally privileged information. If you receive this transmittal in error, please email a reply to the sender and delete the transmittal and any attachments.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

**EXHIBIT D2
DEVELOPERS PROPOSED IMPLEMENTATION GUIDELINES
ATTACHMENT B-1**

SCHEDULE D2

These Guidelines are based on existing City Guidelines as of the Effective Date.

**INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:
PROCEDURE FOR BUILD ON-SITE OPTION
(PROVIDING RENTAL INCLUSIONARY UNITS)**

IV. Affordable Housing Compliance Plan Application (SJMC Sections 5.08.120, 5.08.155, 5.08.320H, 5.08.420, 5.08.610)

As part of the application for First Approval, of any Residential Developments unless otherwise provided in Section III of Exhibit D of the Development Agreement ~~Section III~~, Developers are required to submit a signed Affordable Housing Compliance Plan application to the City, and pay the application processing fee -

Developers who elect the Build On-Site Compliance Option must provide the following information when submitting the Affordable Housing Compliance Plan application: -

- 1) General information about the Developer and the Residential Development;
- 2) Whether the Developer intends to seek a parcel, or tentative, and final map for the project;
- 3) Affirming that the Developer intends to build Inclusionary Rentals on-site consistent with the - standards in the Development Agreement;
- 4) Detailed information about the unit makeup of the Residential Development:
 - i. Total number of units,
 - ii. Total number of Inclusionary Rentals by income level of the units,
 - iii. Unit type (e.g. townhouse, attached multi-family) and tenure (e.g. For-Sale or - Rental),
 - iv. Number of bedrooms and bathrooms,
 - v. Parcel map and/or site plan(s) indicating the proposed location and square footage of both the Inclusionary Units and the market rate units,
 - vi. Construction and completion schedule of all Inclusionary and market rate units, and
 - vii. Phasing of Inclusionary Rentals in relation to market rate rentals.
- 5) As part of the Affordable Housing Compliance Plan application process, Developers shall provide a marketing plan that includes the following:
 - i. Anticipated timeline for the rental of both market rate and Inclusionary Units, and
 - ii. The planned approach to offering the Inclusionary Rentals to the public in a non-discriminatory and equitable manner.

V. Inclusionary Housing Agreement (SJMC Sections 5.08.195, 5.08.420, 5.08.460, 5.08.600, 5.08.610, 5.08.710)

The Inclusionary Housing Agreement is a covenant by the Developer for the benefit of the City of San José governing how the ~~project~~ Residential Development's inclusionary housing obligation will be satisfied. The Inclusionary Housing Agreement may be comprised of more than one document. The City may require that the approved Affordable Housing Compliance Plan application, including all components required to satisfy the Developer's selected compliance option, be attached to the Inclusionary

Housing Agreement.

Prior to the approval of any final or parcel map, or the issuance of any Building Permit for a Residential Development subject to the Ordinance, the City and Developer will execute an Inclusionary Housing Agreement. The Inclusionary Housing Agreement will then be recorded against the entire property on which the Residential Development will be located, and any other property used for the purposes of memorializing the requirement to meet the obligations of the Ordinance.

A marketing plan for the Inclusionary Rentals is required including a commitment to provide the Inclusionary Rentals to the public in a nondiscriminatory and equitable manner. Such a plan should provide for concurrent marketing and the rental of one (1) inclusionary unit for each six (6) market rate units.

VII. Standards for Rental Inclusionary Units (SJMC Section 5.08.470)

The Inclusionary Rentals shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. Square footage will be considered comparable if the total average square footage of Inclusionary Rentals is at least 85% of the total average square footage of the market rate units for each unit by bedroom type (for example, the average square footage for 1-bedroom Inclusionary Rentals must be at least 85% of the average square footage for 1-bedroom market rate units).

In addition, Inclusionary Rentals must be dispersed throughout the project site with the market rate units and not clustered together, except as provided in Section III of

Exhibit D of the Development Agreement.

~~attached townhouses, row houses or multi-family buildings the Inclusionary Rentals shall be located so as not to create a geographic concentration. There is a geographic concentration if the Inclusionary Rentals are clustered in: (a) one area~~ Exhibit D ~~of the Residential Development away from the Market Rate Units, (b) in a separate building from the market rate units, and/or (c) all on one floor or one side of a building~~ Agreement.

The quality of exterior design and overall quality of construction of the Inclusionary Rentals must be consistent with the exterior design of the market rate units. Inclusionary Rentals may - have different interior finishes and features than the market rate units in the Residential - Development, as long as the finishes and features are functionally equivalent to the market rate - units and are durable and of good quality. Functional equivalency includes the architectural style,- detailing, and, to some extent, the quality of materials and the size of structures.

Formatted: Indent: Left: 0.89", First line: 0", Space Before: 2.8 pt

[Note to City: all Section heading ##s, e.g., VIII, internal x-references, page #s, and formatting to be cleaned up once agreement is reached on the substance of these guidelines.]

VIII. Inclusionary Rentals Household Income Limits (SJMC Sections 5.08.400.B, 5.08.600.A)

The Developer is responsible for verifying the income eligibility of Rental Inclusionary Unit tenants, based on the following methodology and definitions.

IHO Guidelines – Attachment B-1: Rental On-Site Compliance Option

1) Household Composition Definition

The Household is comprised of **all** eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Rental. New household members **cannot** be added to the application to income qualify for an Inclusionary Unit after initial submission of an application. In addition, the following individuals are not counted as part of the household: foster children, unborn children, children who are subject to

a shared-custody agreement in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the household at the time of application, and non-related live-in care-takers.

To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria:

- i. All household members who are 18 years of age or more (adult household members) must be included on the application to rent the inclusionary unit; or
- ii. Any minor individual who is a dependent listed on the most recent year's tax returns of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member.

2) Household Income Limits

To establish the eligibility of households who intend to occupy the Inclusionary Rental, limits are set on the amount of income that households (including all Eligible Household Members) can earn. These limits are based on the number of Eligible Household Members; the family size to be used for determining the Household Income Limit is the number of Eligible Household Members.

The Ordinance (No. 30538) Section 5.08.525 Mixed Compliance with Rental Inclusionary Units On-Site includes that five percent (5%) of total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing cost to Moderate Income Households, as defined below:

- i. When Moderate Income Rental Inclusionary Units are provided on-site, Moderate Income Households are defined in the ordinance as households earning no more than 100% of AMI for the household's family size. Please refer to the income limits currently published at 25 Cal. Code Reg Section 6932 for the current AMI in Santa Clara County by family size.

The City of San José annually publishes [Income and Rent Levels](#) for the City and posts these on its website.

Formatted: Indent: Left: 1.14", Right: 0.82", Line spacing: Exactly 13.8 pt

~~IHO Guidelines—Attachment B-1: Rental On-Site Compliance Option—~~

3) Household Income Definition

For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12.

In the event that current monthly income deviates by more than 15% from the preceding 12-month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level.

Formatted: Indent: Left: 0.39"

Formatted: Indent: Left: 0.39", Space After: 0 pt

4) Types of Income

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions;
- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets);

- iii. Interest and dividends (including income from assets – see Excluded Income section below);
 - iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment;
 - v. Payments in lieu of earnings, such as unemployment, disability compensation, and severance pay;
 - vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities;
 - vii. Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the home;
 - viii. All regular pay, special pay and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and
 - ix. Any earned income tax credit to the extent that it exceeds income tax liability.
- 5) Excluded Income
- i. Casual, sporadic or irregular gifts;
 - ii. Amounts that are specifically for, or in reimbursement of, medical expenses;
 - iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses;

~~HHO Guidelines – Attachment B 1: Rental On Site Compliance Option~~

- iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income;
- v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire;
- vi. Foster child care payments;
- vii. The value of benefits received from the Supplemental Nutrition Assistance Program.
- viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973;
- ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes;
- x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program;
- xi. Payments received from the Job Training Partnership Act; and
- xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians.

6) Determination of Income from Assets

To determine a Household's income eligibility for occupancy of an Inclusionary Rental, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the Housing Department website for current [income limits](#). When the total of the Household's assets exceed the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of:

- i. The actual annual income generated from the assets; or
- ii. 2.5% of all assets in excess of the Household Income Limit.

7) Assets

Assets are defined as:

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds;
- ii. Marketable securities, stocks, bonds and other forms of capital investment;
- iii. Inheritance and lump sum insurance payments, already received;
- iv. Settlements for personal or property damage already received;
- v. Equity in real estate including residential and commercial property and unimproved land; and
- vi. Other personal property that is readily convertible into cash.

The following are not considered assets:

Formatted: Indent: Left: 1.21", Hanging: 0.43", Right: 0.52", Line spacing: Exactly 13.75 pt

Formatted: Indent: Left: 1.14", Space After: 0 pt

- i. Ordinary household effects including furniture, fixtures, and personal property;
- ii. Automobiles used for personal use; and
- iii. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service.

IX. Affordable Rental Rates for On-Site Rental Inclusionary Units (SJMC Section 5.08.400.A)

The City of San José annually publishes AMI levels for the City and posts these on [its website](#). As defined in Health and Safety Code Section 50052.5 (h), the family size appropriate for the Rental Inclusionary Unit is determined by the number of bedrooms. The “family size” is equal to one person greater than the number of bedrooms in the unit. For the purpose of determining the Affordable Rental Rate, each Rental Inclusionary Unit shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons. These apply when there are no other pertinent federal statutes applicable to the Rental Inclusionary Units. However if federal statutes apply (e.g. Tax Credit Allocation Committee - TCAC) the following occupancy guidelines may be used: 1.5 persons per bedroom. Owners may make an election to use the TCAC occupancy guidelines for an entire property.

Affordable Rental Rate includes all charges related to occupancy of the unit including utilities, parking fees, fees for use of common facilities and other fees and charges. If utilities are paid by tenants of the Rental Inclusionary Units, the rent for the Rental Inclusionary Units must be adjusted downward for tenant utility expenses, calculated in accordance with the utility allowances published by the Santa Clara Housing Authority annually.

In situations where there are multiple affordability restrictions/income or rent limits set by different funding requirements or jurisdictions, the Project must adhere to the strictest requirement so it can meet all of the layering restrictions.

X. Occupancy Conditions

The approved tenant(s) must occupy the Rental Inclusionary Unit as its principal residence during the entire term of the lease. If an additional occupant (roommate, family member, etc.) moves into the Rental Inclusionary Unit, he/she will be considered part of the existing

Formatted: Indent: Left: 1.14"

Formatted: Indent: Left: 1.14", Space After: 0 pt

Formatted: Indent: Left: 0.89", Right: 0.57", Space After: 0 pt, Line spacing: Exactly 13.75 pt

household. As a condition for lease or occupancy of a Rental Inclusionary Unit, tenant must be required to provide notice to the owner/property manager, prior to the move in date of a new household member, and the entire household (including the new occupant) will be reevaluated to determine eligibility, including household income requirements. If the tenant(s) fail to receive approval from the owner/property manager for any changes in occupancy or if the tenant(s) subleases the property or fails to provide the annual Tenant Income Certification, the tenant shall be in violation of its lease and will no longer qualify as a Rental Inclusionary Unit tenant. If the owner/property manager suspects that there have been any changes to the occupancy of the Rental Inclusionary Unit, the owner/property manager shall make a reasonable effort to determine who is occupying the unit.

XI. Minimum Household Size

To be eligible for a Rental Inclusionary Unit, a household must be of a size at least equal to the number of bedrooms in the Rental Inclusionary Unit. For example, in order to rent a two-bedroom unit, a household must have at least two Eligible Household Members. Minimum household sizes for Rental Inclusionary units are as follows: one bedroom unit = one person, two bedroom unit = two persons, three bedroom unit = three persons, four bedroom unit = four persons. A household is comprised of all eligible individuals who are currently living together at the same address and will continue to be living together in the Rental Inclusionary Unit.

XII. Annual Rent Adjustments

The maximum Affordable Rental Rates will be adjusted annually based on the most recently published household income limits for Santa Clara County by family size. The City or its agent will notify the property owner/property manager of the new rental rates. If the owner chooses to raise rents, the tenant must be given a sixty (60) day notice before any rent increase.

XIII. Ongoing Compliance with Affordability Restrictions (SJMC Section 5.08.710)

The developer of each project containing Rental Inclusionary Units is required to submit an Annual Compliance Report and pay any City monitoring fees. The Annual Compliance Report (ACR) consists of the following three documents which may be obtained from the Department of Housing's website at <http://www.sjhousing.org/>.

- 1) Tenant Income Certification (TIC): Completed and signed by residents residing in the Inclusionary Rental. It is used to document family size, income and other financial information. Residents must be recertified annually to maintain eligibility at the inclusionary project.
- 2) Certified Rent Rolls: A report listing each affordable unit, the resident's name, rental rate, household income, the household size, and any other information regarding property tenancy. Rent Rolls should be electronically submitted in an excel spreadsheet provided by the Department of Housing. The Rent Roll form can be found here: <http://www.sjhousing.org/>. The City reserves the right to change the Rent Roll form at any time.

Formatted: Indent: Left: 0.89", Right: 0.57", Line spacing: Exactly 13.75 pt

Formatted: Right: 0.57"

Formatted: Indent: Left: 1.14", Right: 0.32", Line spacing: Exactly 13.8 pt

- 3) Certificate of Continuing Program Compliance: A signed statement attesting that the project is in compliance with the City of San José Inclusionary Housing Agreement. The Annual Certificate of Continuing Program Compliance can be found here: <http://www.sjhousing.org/>

XIV. Annual Tenant Income Certification (TIC) (SJMC Section 5.08.710)

Leases for Rental Inclusionary Units shall provide for submittal of signed TIC forms upon written request of the owner or property manager and if tenants fail to submit the form within thirty (30) days of receipt of a written request, then this is a violation of the lease and the lease shall automatically terminate. If the renter fails to comply after notice, the owner or property manager will institute eviction proceedings. If a tenant's household income increases and exceeds 140% of the Moderate Income Limit, the tenant will be given three months to locate alternate housing and vacate the inclusionary apartment unit. A three-month extension may be granted in cases of extreme hardship. The property may also offer the tenant a market rate unit.

XV. Terms of Tenancy

Rental Inclusionary Unit tenants will be subject to the same conditions of tenancy as other tenants occupying the same property, except for terms relating to occupancy, income eligibility, annual recertification, and limits on rents. The initial lease term for the Inclusionary Rental will be for one year.

XVI. Availability of New Units for Lease

A Rental Inclusionary Unit may not be leased until the City has approved the unit for occupancy.

XVII. Marketing /Leasing of Units

The Developer is responsible for marketing the Inclusionary Rentals and identifying qualified tenants that meet the income eligibility requirements of the Rental Inclusionary Units. Developer shall post the available Rental Inclusionary Units on the county-wide listing service site located at www.scchousingsearch.org or such other site as may be requested by the City. In reviewing each candidate, the owner or property manager may apply the same tenant selection criteria, such as past performance in meeting financial obligations and credit references, as those applied to applicants for non-inclusionary units on the property, except for those standards relating to income eligibility.

The Inclusionary Rentals within a Residential Development will not be operated at less than ninety percent (90%) occupancy for more than six consecutive months unless market conditions otherwise dictate. Developer shall post each vacant Rental Inclusionary Unit as soon as possible

Formatted: Indent: Left: 1.14", Right: 0.32", Line spacing: Exactly 13.8 pt

Formatted: Indent: Left: 0.89", Right: 0.36", Space After: 0 pt, Line spacing: Exactly 13.8 pt

~~HIO Guidelines—Attachment B-1: Rental On-Site Compliance Option~~

but not later than ten (10) days after notice of an impending vacancy and provide advanced notice of the opening of any wait list on the county-wide listing service site located at www.scchousingsearch.org or such other site as may be requested by the City.

XVIII. Owner/Manager Certification

Prior to the rental of the first Rental Inclusionary Unit on a property, the owner/property manager will sign a certification of receipt of these Guidelines with a statement of intent to manage the Rental Inclusionary Units according to these procedures. Developers will also submit to the City for approval a management plan consistent with the City's standards for management of affordable units. Subsequent property owners/property manager may be asked to sign certifications of receipt of these Guidelines.

Formatted: Indent: Left: 0.89", Right: 0.36", Line spacing: Exactly 13.8 pt

Formatted: Right: 0.36"

ATTACHMENT A-1
INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:
PROCEDURE FOR BUILD ON-SITE OPTION
(PROVIDING FOR-SALE INCLUSIONARY UNITS)

VIII. Pricing For-Sale Inclusionary Homes (SJMC Sections 5.08.400.B, 5.08.600.A)

Inclusionary Homes are sold at their Fair Market Value, as defined below but discounted by an amount that is equal to the difference between the Fair Market Rate value of the home and the Affordable Housing Cost as adjusted to an Affordable Sales Price pursuant to these Guidelines, and the buyer of an Inclusionary Home acknowledges the discount provided under the Ordinance by execution of subordinate shared appreciation loan documents and agrees to the income restriction and other conditions. In escrow, the buyer executes a City promissory note and other

4

Formatted: Indent: Left: 0.89", Right: 0.33", Line
spacing: Exactly 13.8 pt

~~HIO Guidelines – Attachment A.1: For Sale On Site Compliance Option~~

subordinate shared appreciation loan documents that reflect this cost differential, also referred to as “Developer Discount.”

“Fair Market Value” for the purposes of the Ordinance and the Guidelines, means the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obligated to sell, and a buyer, being ready, willing and able to buy but under no particular or urgent necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the Inclusionary Home is reasonably adaptable and available but as though there was no affordability requirement imposed on the home. The Fair Market Value shall be verified by a licensed real estate appraiser, commissioned by the borrower or borrower’s lender, prior to the close of escrow.

The Developer must provide 90 days’ advance written notice to the City of the initial marketing of the Inclusionary Homes. The Housing Department will calculate the Affordable Housing Cost, as adjusted to an Affordable Sales Price pursuant to these Guidelines which will then be identified as the maximum affordable price that may be charged to prospective homebuyers for the Inclusionary Homes within a Residential Development. This calculation of Affordable Sales Price shall be done within 90 days before the date of the first close of escrow for an Inclusionary Home in a project and the values (Affordable Sales Price and Fair Market Value) shall be updated every 90 days thereafter.

Method of Calculating the Income Limit for Pricing

First, using the number of bedrooms in the particular Inclusionary Home, the maximum income limit of 110% of AMI (as shown in the Santa Clara County table contained in 25 Cal. Code Reg. Section 6932, or successor regulation, prorated from the 100% of AMI amount if needed) is adjusted for family size. In order to adjust for family size as defined in Health and Safety Code Section 50052.5 (h) the family size appropriate for the Inclusionary Home is determined by the number of bedrooms. That “family size” is equal to one person greater than the number of bedrooms in the home. Specifically, for the purpose of determining the income limit in order to calculate the Affordable Housing Cost, each Inclusionary Home shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons.

The income limits in 25 Cal. Code Reg. Section 6932 are updated annually by the California Department of Housing and Community Development (HCD) and posted on the [City’s website](#).
Method of Calculating the Affordable Housing Cost and Affordable Sales Price

Pursuant to Health & Safety Code Section 50052.5, the Affordable Housing Cost for an owner occupied unit is 35% of the Income Limit. The monthly Affordable Housing Cost is calculated by dividing the Affordable Housing Cost by 12. This monthly Affordable Housing Cost is intended to cover all of the purchaser’s housing costs, so in order to determine the maximum affordable sales price (“Affordable Sales Price”) that Affordable Housing Cost amount must be adjusted as described below.

5 _____

Formatted: Indent: Left: 0.89", Right: 0.33", Line spacing: Exactly 13.8 pt

Formatted: Right: 0.33", Line spacing: Exactly 13.8 pt

Formatted: Indent: Left: 0.89", Right: 0.45", Space After: 0 pt, Line spacing: Exactly 13.75 pt

The City uses the procedures adopted by HCD in 25 Cal. Code Reg. Section 6920 as a basis to establish the Affordable Sales Price based on the Affordable Housing Cost. To determine the Affordable Sales Price from the monthly Affordable Housing Cost involves a three-step process:

- 1) Subtract applicable property taxes, homeowners' association fees, annual maintenance and repair allowance, insurance – including hazard insurance, mortgage insurance and other applicable insurance – and utilities cost from the monthly Affordable Housing Cost amount. The remainder is the amount that would be available to pay the monthly mortgage payment (monthly **Affordable Mortgage Payment**).

To establish a consistent methodology, the Housing Department has defined the following criteria for calculating housing related expenses that must be covered by the Affordable Housing Cost in addition to the mortgage payment:

- i. Homeowner Association (HOA) Fees – Actual amount approved by the State of California Department of Real Estate for the project.
 - ii. Property Tax – The Housing Department shall use the standard of 1.25% of the Market Price of the unit. In the event that any special assessments bring the property tax rate above 1.25%, the City will utilize the actual property tax rate for the Inclusionary Home.
 - iii. Utility Costs – See current Utility Allowance schedule provided by the Santa Clara County Housing Authority. The utility allowance must include heating, cooking, other electric, water heater, water, and garbage, if not included in HOA fees. The utility allowance changes periodically so please check the Santa Clara County Housing Authority website to obtain current information www.hacsc.org.
 - iv. Hazard Insurance Cost – If not included in HOA fees, the City will estimate the monthly cost of hazard insurance at \$75. This amount may be adjusted for inflation.
 - v. Mortgage Insurance Premium – If the calculated amount of the Developer Discount Loan is not greater than 20% of the Fair Market Value of the property, the Housing Department will establish a market rate Private Mortgage Insurance (PMI) premium corresponding to the rates published by the Federal Housing Administration (FHA).
 - vi. Maintenance and Repair Allowance of \$25 per bedroom, per month. This amount may be adjusted for inflation.
- 2) Follow the process below to calculate the amount of the mortgage loan that could be obtained (**Financed Affordable Loan**) based on the amount of monthly Affordable Mortgage Payment as determined in Step 1 above.
 - i. The mortgage loan interest rate shall be based on a 5% down payment, thirty (30) year, fully amortizing fixed rate mortgage based on the Freddie Mac Weekly Mortgage Survey at the time of pricing, as determined by the Housing Department. This mortgage amount does not include any pre-paid points or loan fees.

- ii. Using the Monthly Affordable Mortgage Payment, the interest rate calculated above, and a fully amortized fixed rate mortgage without points or loan fees to determine the maximum Financed Affordable Loan.
- 3) Add to the Financed Affordable Loan amount determined in Step 2 an assumed amount of borrowers' own funds of 5% for a down payment to determine the **Affordable Sales Price**.
Waiver required under SJMC 5.08.400.B.4

A Developer may apply for limited term waiver of the terms of the subordinate shared appreciation documents required by SJMC Section 5.08.600.A, which shall be granted if the appraised unrestricted market value of an inclusionary home is less than 5% greater than the Affordable Sales Price (as determined from the Affordable Housing Cost). The term of the waiver shall not exceed 6 months. The waiver shall require that the Inclusionary Home be sold at or below the Affordable Sales Price and that the Inclusionary Home shall initially be owner-occupied. In the event that the waiver is granted, requirements of the subordinate shared appreciation documents will be waived and the City will not require income verification for the purchaser.

IX. Homeowner Inclusionary Housing Requirements (SJMC 5.08.600.F)

1) First Time Home Buyer Requirement

Purchasers of Inclusionary Homes must be certified by the Housing Department as First Time Home Buyers. In order to be certified as a First Time Homebuyer, the home buyer must be the unit's Principal Occupant, and cannot hold or have held an Ownership Interest, in whole or in part, of a residential property during the three-year period immediately prior to the home buyer(s) certification of eligibility by the Housing Department to purchase an Inclusionary Home unless one of the following is true:

- i. Is a "displaced homemaker" who within the past two years has not worked on a full-time basis in the labor market, experiencing difficulty in obtaining employment, and has worked primarily without pay to care for the home and family;
- ii. Is a single parent who is unmarried or legally separated from a spouse, is pregnant, or has sole or joint custody of at least one minor child, and does not have an Ownership Interest in residential property; or
- iii. Is a current owner-occupant of a mobile home that does not meet local building codes, and the home cannot be brought into compliance for less than the cost of constructing a new home.

2) Household Composition Definition

The Household is comprised of **all** eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Home. New household members **cannot** be added to the application to income qualify for an Inclusionary Home after initial submission of an application. In addition, the following individuals are not

Formatted: Indent: Left: 1.64", Right: 0.47", Line spacing: Exactly 13.8 pt

Formatted: Indent: Left: 1.14", Right: 0.34", Space After: 0 pt, Line spacing: Exactly 13.8 pt

~~HIO Guidelines— Attachment A. 1: For Sale On Site Compliance Option—~~

counted as part of the household: foster children, unborn children, children who are subject to a shared-custody agreement, in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the household at the time of application, and non-related live-in care-takers.

To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria:

- i. All household members who are 18 years of age or more (adult household members) must be included for income qualification purposes documents and must appear on the application to purchase the Inclusionary Home; or
- ii. Any minor individual who is a dependent listed on the most recent year's tax returns of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member.

3) Household Income Limits for Buyers

To establish the eligibility of households who intend to purchase an Inclusionary Home, limits are set on the amount of income households (including all Eligible Household Members) can earn. These limits are based on the AMI and the number of Eligible Household Members.

The Ordinance allows moderate-income households to purchase Inclusionary Homes.

Moderate-income households are defined as those with gross incomes between 90% and 110% of AMI. The City publishes the [AMI](#) and the income limits are updated annually.

4) Household Income Definition

Households may not have an income in excess of 110% of AMI (Household Income Limit).

The family size to be used for determining the Household Income Limit is the number of Eligible Household Members. For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12.

In the event that current monthly income deviates by more than 15% from the preceding 12-month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level.

5) Types of Income

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions; -

Formatted: Indent: Left: 1.14", Right: 0.34", Line spacing: Exactly 13.8 pt

Formatted: Right: 0.34"

Formatted: Indent: Left: 1.3", Hanging: 0.34", Right: 0.65", Line spacing: Exactly 13.8 pt

- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets);
 - iii. Interest and dividends (including income from assets – see Excluded Income section below);
 - iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment;
 - v. Payments in lieu of earnings, such as unemployment, disability compensation, and severance pay;
 - vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities;
 - vii. Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the home;
 - viii. All regular pay, special pay, and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and
 - ix. Any earned income tax credit to the extent that it exceeds income tax liability.
- 6) Excluded Income
- i. Casual, sporadic or irregular gifts;
 - ii. Amounts that are specifically for, or in reimbursement of, medical expenses;
 - iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses;
 - iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income;
 - v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire;
 - vi. Foster child care payments;
 - vii. The value of benefits received from the Supplemental Nutrition Assistance Program.
 - viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973;
 - ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes;
 - x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program;
 - xi. Payments received from the Job Training Partnership Act; and
 - xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians.

Formatted: Indent: Left: 1.3", Hanging: 0.34", Right: 0.65", Line spacing: Exactly 13.8 pt

Formatted: Indent: Left: 1.17", Hanging: 0.47", Right: 0.35", Line spacing: Exactly 13.8 pt, Tab stops: 1.64", Left

7) Determination of Income from Assets

To determine a Household's income eligibility for purchase of an Inclusionary Home, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the of Housing Department website for current [income limits](#). When the total of the Household's assets exceeds the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of:

- i. The actual annual income generated from the assets; or
- ii. 2.5% of all assets in excess of the Household Income Limit.

8) Assets

Assets are defined as:

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds;
- ii. Marketable securities, stocks, bonds, and other forms of capital investment;
- iii. Inheritance and lump sum insurance payments, already received;
- iv. Settlements for personal or property damage already received;
- v. Equity in non-residential real estate such as commercial property and unimproved land, except as described as "not considered asset" iii below; and
- vi. Other personal property that is readily convertible into cash.

The following are not considered assets:

- i. Ordinary household effects including furniture, fixtures, and personal property;
- ii. Automobiles used for personal use;
- iii. Any deposits on Inclusionary Home (Equity on a parcel or lot on which an Inclusionary Home is to be built); and
- iv. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service.

9) Execution of Subordinate Shared Appreciation Loan Documents; Restrictions (SJM Section 5.08.600)

Each purchaser will be required to execute a promissory note in favor of the City of San José, secured by a deed of trust for the amount of the Subordinate Shared Appreciation Loan. The City will also require a recorded Affordability Restriction as described in Part IX, Section 10 below and may require execution of a loan agreement and other ancillary documents. The Subordinate Shared Appreciation Loan amount is Developer Discount, which the difference, if any, between the restricted Affordable Sales Price of the Inclusionary Home and its Fair Market Value at the time of the initial sale to the purchaser.

Formatted: Indent: Left: 1.17", Hanging: 0.47", Right: 0.35", Line spacing: Exactly 13.8 pt, Tab stops: 1.64", Left

Formatted: Indent: Left: 1.14", Right: 0.32", Space After: 0 pt, Line spacing: Exactly 13.8 pt

~~HIO Guidelines— Attachment A. 1: For Sale On Site Compliance Option—~~

If the property is subsequently transferred to a non-qualified affordable buyer, the Subordinate Shared Appreciation Loan would become due and payable along with a prorated percentage of any equity received in the sale to a non-qualifying buyer under the Ordinance. The Subordinate Shared Appreciation Loan would not become due and payable if the property is sold to a qualified buyer under the Ordinance who agrees to assume the loan, in an arm's length transaction. If the property is sold to a qualified buyer under the Ordinance who does not agree to assume the loan, then the Subordinate Shared Appreciation Loan would become due and payable along with a prorated percentage of any equity based on the then Fair Market Value of the unit.

The Inclusionary Home shall be the purchaser's primary place of residence. To be considered as a principal place of residency, the Inclusionary Home must not be rented or leased unless the purchaser has a household hardship and has applied for and obtained an emergency limited term authorization to rent approved by the Director of Housing. In the event that the purchaser fails to comply with this requirement the City may enforce and pursue any and all remedies in law or equity for such violations, including, but not limited to, declaring the Subordinate Shared Appreciation Loan due and payable.

Upon request of the Housing Department, the purchaser of the Inclusionary Home must provide, within 30 days, documents verifying the purchaser's occupancy of the home as the purchaser's primary residence, that the home is not rented or leased, and that there have been no changes in the title to the home. Such documents may include but are not limited to utility bills, property tax bills, and mortgage statements reflecting the owners name and address of the Inclusionary Home. Pursuant to the Subordinate Shared Appreciation Loan documents, an annual submittal will be required thereafter, along with a monitoring fee.

~~10) Execution of an Affordability Restriction (SJMCA Section 5.08.600.A)—~~

~~Each purchaser of an Inclusionary Home will be required to execute and consent to recording of an Affordability Restriction for their unit at close of escrow, with a term consistent with Exhibit D Section III of the Development Agreement. The restriction will be recorded and "run with the land" such that it is binding on any successor to the purchaser.~~

~~The Affordability Restriction will require that the purchaser occupying the home as a principal residence, unless a hardship exception is granted. It will also require that any sale of the Inclusionary Home be limited to sale to a new qualified affordable purchaser at an Affordable Sales Price. And that any request to sell to a non-qualified buyer must be approved by the City, and the sale to a non-qualified buyer must be consistent with the terms of the City's adopted equity share program and the Ordinance.~~

[Note to City: affordability restriction paragraph deleted below because it covered in the Reg Agmnt.]

—

Formatted: Indent: Left: 1.14", Right: 0.32", Line spacing: Exactly 13.8 pt

Formatted: Indent: Left: 1.14"

Formatted: Right: 0", Line spacing: single

Formatted: Right: 0", Line spacing: single

Formatted: Indent: Left: 1.14"

EXHIBIT D2
DEVELOPERS PROPOSED IMPLEMENTATION GUIDELINES
ATTACHMENT B-1

SCHEDULE D2

These Guidelines are based on existing City Guidelines as of the Effective Date.

INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:
PROCEDURE FOR BUILD ON-SITE OPTION
(PROVIDING RENTAL INCLUSIONARY UNITS)

IV. Affordable Housing Compliance Plan Application (SJMC Sections 5.08.120, 5.08.155, 5.08.320H, 5.08.420, 5.08.610)

As part of the application for First Approval, of any Residential Developments unless otherwise provided in Section III of Exhibit D of the Development Agreement, Developers are required to submit a signed Affordable Housing Compliance Plan application to the City, and pay the application processing fee. Developers who elect the Build On-Site Compliance Option must provide the following information when submitting the Affordable Housing Compliance Plan application:

- 1) General information about the Developer and the Residential Development;
- 2) Whether the Developer intends to seek a parcel, or tentative, and final map for the project;
- 3) Affirming that the Developer intends to build Inclusionary Rentals on-site consistent with the standards in the Development Agreement;
- 4) Detailed information about the unit makeup of the Residential Development:
 - i. Total number of units,
 - ii. Total number of Inclusionary Rentals by income level of the units,
 - iii. Unit type (e.g. townhouse, attached multi-family) and tenure (e.g. For-Sale or Rental),
 - iv. Number of bedrooms and bathrooms,
 - v. Parcel map and/or site plan(s) indicating the proposed location and square footage of both the Inclusionary Units and the market rate units,
 - vi. Construction and completion schedule of all Inclusionary and market rate units, and
 - vii. Phasing of Inclusionary Rentals in relation to market rate rentals.
- 5) As part of the Affordable Housing Compliance Plan application process, Developers shall provide a marketing plan that includes the following:
 - i. Anticipated timeline for the rental of both market rate and Inclusionary Units, and
 - ii. The planned approach to offering the Inclusionary Rentals to the public in a non-discriminatory and equitable manner.

V. Inclusionary Housing Agreement (SJMC Sections 5.08.195, 5.08.420, 5.08.460, 5.08.600, 5.08.610, 5.08.710)

The Inclusionary Housing Agreement is a covenant by the Developer for the benefit of the City of San José governing how the Residential Development's inclusionary housing obligation will be satisfied. The Inclusionary Housing Agreement may be comprised of more than one document. The City may require that the approved Affordable Housing Compliance Plan application, including all components required to satisfy the Developer's selected compliance option, be attached to the Inclusionary Housing Agreement.

Prior to the approval of any final or parcel map, or the issuance of any Building Permit for a

Residential Development subject to the Ordinance, the City and Developer will execute an Inclusionary Housing Agreement. The Inclusionary Housing Agreement will then be recorded against the entire property on which the Residential Development will be located, and any other property used for the purposes of memorializing the requirement to meet the obligations of the Ordinance.

A marketing plan for the Inclusionary Rentals is required including a commitment to provide the Inclusionary Rentals to the public in a nondiscriminatory and equitable manner. Such a plan should provide for concurrent marketing and the rental of one (1) inclusionary unit for each six (6) market rate units.

VII. Standards for Rental Inclusionary Units (SJMC Section 5.08.470)

The Inclusionary Rentals shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. Square footage will be considered comparable if the total average square footage of Inclusionary Rentals is at least 85% of the total average square footage of the market rate units for each unit by bedroom type (for example, the average square footage for 1-bedroom Inclusionary Rentals must be at least 85% of the average square footage for 1-bedroom market rate units).

In addition, Inclusionary Rentals must be dispersed throughout the project site with the market rate units and not clustered together, except as provided in Section III of Exhibit D of the Development Agreement.

The quality of exterior design and overall quality of construction of the Inclusionary Rentals must be consistent with the exterior design of the market rate units. Inclusionary Rentals may have different interior finishes and features than the market rate units in the Residential Development, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality. Functional equivalency includes the architectural style, detailing, and, to some extent, the quality of materials and the size of structures.

[Note to City: all Section heading ###s, e.g., VIII, internal x-references, page #s, and formatting to be cleaned up once agreement is reached on the substance of these guidelines.]

VIII. Inclusionary Rentals Household Income Limits (SJMC Sections 5.08.400.B, 5.08.600.A)

The Developer is responsible for verifying the income eligibility of Rental Inclusionary Unit tenants, based on the following methodology and definitions.

IHO Guidelines – Attachment B-1: Rental On-Site Compliance Option

1) Household Composition Definition

The Household is comprised of **all** eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Rental. New household members **cannot** be added to the application to income qualify for an Inclusionary Unit after initial submission of an application. In addition, the following individuals are not counted as part of the household: foster children, unborn children, children who are subject to a shared-custody agreement in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the household at the time of application, and non-related live-in care-takers.

To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria:

- i. All household members who are 18 years of age or more (adult household members) must be included on the application to rent the inclusionary unit; or
- ii. Any minor individual who is a dependent listed on the most recent year's tax returns

of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member.

2) Household Income Limits

To establish the eligibility of households who intend to occupy the Inclusionary Rental, limits are set on the amount of income that households (including all Eligible Household Members) can earn. These limits are based on the number of Eligible Household Members; the family size to be used for determining the Household Income Limit is the number of Eligible Household Members.

The Ordinance (No. 30538) Section 5.08.525 Mixed Compliance with Rental Inclusionary Units On-Site includes that five percent (5%) of total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing cost to Moderate Income Households, as defined below:

- i. When Moderate Income Rental Inclusionary Units are provided on-site, Moderate Income Households are defined in the ordinance as households earning no more than 100% of AMI for the household's family size. Please refer to the income limits currently published at 25 Cal. Code Reg Section 6932 for the current AMI in Santa Clara County by family size.

The City of San José annually publishes [Income and Rent Levels](#) for the City and posts these on its website.

3) Household Income Definition

For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12.

In the event that current monthly income deviates by more than 15% from the preceding 12-month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level.

4) Types of Income

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions;
- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets);
- iii. Interest and dividends (including income from assets – see Excluded Income section below);
- iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment;
- v. Payments in lieu of earnings, such as unemployment, disability compensation, and

- severance pay;
- vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities;
- vii. Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the home;
- viii. All regular pay, special pay and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and
- ix. Any earned income tax credit to the extent that it exceeds income tax liability.

5) Excluded Income

- i. Casual, sporadic or irregular gifts;
- ii. Amounts that are specifically for, or in reimbursement of, medical expenses;
- iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses;
- iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income;
- v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire;
- vi. Foster child care payments;
- vii. The value of benefits received from the Supplemental Nutrition Assistance Program.
- viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973;
- ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes;
- x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program;
- xi. Payments received from the Job Training Partnership Act; and
- xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians.

6) Determination of Income from Assets

To determine a Household's income eligibility for occupancy of an Inclusionary Rental, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the Housing Department website for current [income limits](#). When the total of the Household's assets exceed the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of:

- i. The actual annual income generated from the assets; or
- ii. 2.5% of all assets in excess of the Household Income Limit.

7) Assets

Assets are defined as:

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds;

- ii. Marketable securities, stocks, bonds and other forms of capital investment;
- iii. Inheritance and lump sum insurance payments, already received;
- iv. Settlements for personal or property damage already received;
- v. Equity in real estate including residential and commercial property and unimproved land; and
- vi. Other personal property that is readily convertible into cash.

The following are not considered assets:

- i. Ordinary household effects including furniture, fixtures, and personal property;
- ii. Automobiles used for personal use; and
- iii. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service.

IX. Affordable Rental Rates for On-Site Rental Inclusionary Units (SJMC Section 5.08.400.A)

The City of San José annually publishes AMI levels for the City and posts these on [its website](#). As defined in Health and Safety Code Section 50052.5 (h), the family size appropriate for the Rental Inclusionary Unit is determined by the number of bedrooms. The “family size” is equal to one person greater than the number of bedrooms in the unit. For the purpose of determining the Affordable Rental Rate, each Rental Inclusionary Unit shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons. These apply when there are no other pertinent federal statutes applicable to the Rental Inclusionary Units. However if federal statutes apply (e.g. Tax Credit Allocation Committee - TCAC) the following occupancy guidelines may be used: 1.5 persons per bedroom. Owners may make an election to use the TCAC occupancy guidelines for an entire property. Affordable Rental Rate includes all charges related to occupancy of the unit including utilities, parking fees, fees for use of common facilities and other fees and charges. If utilities are paid by tenants of the Rental Inclusionary Units, the rent for the Rental Inclusionary Units must be adjusted downward for tenant utility expenses, calculated in accordance with the utility allowances published by the Santa Clara Housing Authority annually.

In situations where there are multiple affordability restrictions/income or rent limits set by different funding requirements or jurisdictions, the Project must adhere to the strictest requirement so it can meet all of the layering restrictions.

X. Occupancy Conditions

The approved tenant(s) must occupy the Rental Inclusionary Unit as its principal residence during the entire term of the lease. If an additional occupant (roommate, family member, etc.) moves into the Rental Inclusionary Unit, he/she will be considered part of the existing household. As a condition for lease or occupancy of a Rental Inclusionary Unit, tenant must be required to provide notice to the owner/property manager, prior to the move in date of a new household member, and the entire household (including the new occupant) will be reevaluated to determine eligibility, including household income requirements. If the tenant(s) fail to receive approval from the owner/property manager for any changes in occupancy or if the tenant(s) subleases the property or fails to provide the annual Tenant Income Certification, the tenant shall be in violation of its lease and will no longer qualify as a Rental Inclusionary Unit tenant.

If the owner/property manager suspects that there have been any changes to the occupancy of the Rental Inclusionary Unit, the owner/property manager shall make a reasonable effort to determine who is occupying the unit.

XI. Minimum Household Size

To be eligible for a Rental Inclusionary Unit, a household must be of a size at least equal to the number of bedrooms in the Rental Inclusionary Unit. For example, in order to rent a two-bedroom unit, a household must have at least two Eligible Household Members. Minimum household sizes for Rental Inclusionary units are as follows: one bedroom unit = one person, two bedroom unit = two persons, three bedroom unit = three persons, four bedroom unit = four persons. A household is comprised of all eligible individuals who are currently living together at the same address and will continue to be living together in the Rental Inclusionary Unit.

XII. Annual Rent Adjustments

The maximum Affordable Rental Rates will be adjusted annually based on the most recently published household income limits for Santa Clara County by family size. The City or its agent will notify the property owner/property manager of the new rental rates. If the owner chooses to raise rents, the tenant must be given a sixty (60) day notice before any rent increase.

XIII. Ongoing Compliance with Affordability Restrictions (SJMC Section 5.08.710)

The developer of each project containing Rental Inclusionary Units is required to submit an Annual Compliance Report and pay any City monitoring fees. The Annual Compliance Report (ACR) consists of the following three documents which may be obtained from the Department of Housing's website at <http://www.sjhousing.org/>.

- 1) Tenant Income Certification (TIC): Completed and signed by residents residing in the Inclusionary Rental. It is used to document family size, income and other financial information. Residents must be recertified annually to maintain eligibility at the inclusionary project.
- 2) Certified Rent Rolls: A report listing each affordable unit, the resident's name, rental rate, household income, the household size, and any other information regarding property tenancy. Rent Rolls should be electronically submitted in an excel spreadsheet provided by the Department of Housing. The Rent Roll form can be found here: <http://www.sjhousing.org/>. The City reserves the right to change the Rent Roll form at any time.
- 3) Certificate of Continuing Program Compliance: A signed statement attesting that the project is in compliance with the City of San José Inclusionary Housing Agreement. The Annual Certificate of Continuing Program Compliance can be found here: <http://www.sjhousing.org/>

XIV. Annual Tenant Income Certification (TIC) (SJMC Section 5.08.710)

Leases for Rental Inclusionary Units shall provide for submittal of signed TIC forms upon written request of the owner or property manager and if tenants fail to submit the form within thirty (30) days of receipt of a written request, then this is a violation of the lease and the lease shall automatically terminate. If the renter fails to comply after notice, the owner or property manager will institute eviction proceedings. If a tenant's household income increases and exceeds 140% of the Moderate Income Limit, the tenant will be given three months to locate alternate housing and vacate the inclusionary apartment unit. A three-month extension may be granted in cases of extreme hardship. The property may also offer the tenant a market rate unit.

XV. Terms of Tenancy

Rental Inclusionary Unit tenants will be subject to the same conditions of tenancy as other

tenants occupying the same property, except for terms relating to occupancy, income eligibility, annual recertification, and limits on rents. The initial lease term for the Inclusionary Rental will be for one year.

XVI. Availability of New Units for Lease

A Rental Inclusionary Unit may not be leased until the City has approved the unit for occupancy.

XVII. Marketing /Leasing of Units

The Developer is responsible for marketing the Inclusionary Rentals and identifying qualified tenants that meet the income eligibility requirements of the Rental Inclusionary Units. Developer shall post the available Rental Inclusionary Units on the county-wide listing service site located at www.scchousingsearch.org or such other site as may be requested by the City. In reviewing each candidate, the owner or property manager may apply the same tenant selection criteria, such as past performance in meeting financial obligations and credit references, as those applied to applicants for non-inclusionary units on the property, except for those standards relating to income eligibility.

The Inclusionary Rentals within a Residential Development will not be operated at less than ninety percent (90%) occupancy for more than six consecutive months unless market conditions otherwise dictate. Developer shall post each vacant Rental Inclusionary Unit as soon as possible but not later than ten (10) days after notice of an impending vacancy and provide advanced notice of the opening of any wait list on the county-wide listing service site located at www.scchousingsearch.org or such other site as may be requested by the City.

XVIII. Owner/Manager Certification

Prior to the rental of the first Rental Inclusionary Unit on a property, the owner/property manager will sign a certification of receipt of these Guidelines with a statement of intent to manage the Rental Inclusionary Units according to these procedures. Developers will also submit to the City for approval a management plan consistent with the City's standards for management of affordable units. Subsequent property owners/property manager may be asked to sign certifications of receipt of these Guidelines.

ATTACHMENT A-1
INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:
PROCEDURE FOR BUILD ON-SITE OPTION
(PROVIDING FOR-SALE INCLUSIONARY UNITS)

VIII. Pricing For-Sale Inclusionary Homes (SJMC Sections 5.08.400.B, 5.08.600.A)

Inclusionary Homes are sold at their Fair Market Value, as defined below but discounted by an amount that is equal to the difference between the Fair Market Rate value of the home and the Affordable Housing Cost as adjusted to an Affordable Sales Price pursuant to these Guidelines, and the buyer of an Inclusionary Home acknowledges the discount provided under the Ordinance by execution of subordinate shared appreciation loan documents and agrees to the income restriction and other conditions. In escrow, the buyer executes a City promissory note and other subordinate shared appreciation loan documents that reflect this cost differential, also referred to as “Developer Discount.”

"Fair Market Value" for the purposes of the Ordinance and the Guidelines, means the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obligated to sell, and a buyer, being ready, willing and able to buy but under no particular or urgent necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the Inclusionary Home is reasonably adaptable and available but as though there was no affordability requirement imposed on the home. The Fair Market Value shall be verified by a licensed real estate appraiser, commissioned by the borrower or borrower's lender, prior to the close of escrow.

The Developer must provide 90 days' advance written notice to the City of the initial marketing of the Inclusionary Homes. The Housing Department will calculate the Affordable Housing Cost, as adjusted to an Affordable Sales Price pursuant to these Guidelines which will then be identified as the maximum affordable price that may be charged to prospective homebuyers for the Inclusionary Homes within a Residential Development. This calculation of Affordable Sales Price shall be done within 90 days before the date of the first close of escrow for an Inclusionary Home in a project and the values (Affordable Sales Price and Fair Market Value) shall be updated every 90 days thereafter.

Method of Calculating the Income Limit for Pricing

First, using the number of bedrooms in the particular Inclusionary Home, the maximum income limit of 110% of AMI (as shown in the Santa Clara County table contained in 25 Cal. Code Reg. Section 6932, or successor regulation, prorated from the 100% of AMI amount if needed) is adjusted for family size. In order to adjust for family size as defined in Health and Safety Code Section 50052.5 (h) the family size appropriate for the Inclusionary Home is determined by the number of bedrooms. That “family size” is equal to one person greater than the number of bedrooms in the home. Specifically, for the purpose of determining the income limit in order to calculate the Affordable Housing Cost, each Inclusionary Home shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons.

The income limits in 25 Cal. Code Reg. Section 6932 are updated annually by the California Department of Housing and Community Development (HCD) and posted on the [City's website](#).
Method of Calculating the Affordable Housing Cost and Affordable Sales Price

Pursuant to Health & Safety Code Section 50052.5, the Affordable Housing Cost for an owner occupied unit is 35% of the Income Limit. The monthly Affordable Housing Cost is calculated by dividing the Affordable Housing Cost by 12. This monthly Affordable Housing Cost is intended to cover all of the purchaser's housing costs, so in order to determine the maximum affordable sales price ("Affordable Sales Price") that Affordable Housing Cost amount must be adjusted as described below.

The City uses the procedures adopted by HCD in 25 Cal. Code Reg. Section 6920 as a basis to establish the Affordable Sales Price based on the Affordable Housing Cost.

To determine the Affordable Sales Price from the monthly Affordable Housing Cost involves a three-step process:

- 1) Subtract applicable property taxes, homeowners' association fees, annual maintenance and repair allowance, insurance – including hazard insurance, mortgage insurance and other applicable insurance – and utilities cost from the monthly Affordable Housing Cost amount. The remainder is the amount that would be available to pay the monthly mortgage payment (monthly **Affordable Mortgage Payment**).

To establish a consistent methodology, the Housing Department has defined the following criteria for calculating housing related expenses that must be covered by the Affordable Housing Cost in addition to the mortgage payment:

- i. Homeowner Association (HOA) Fees – Actual amount approved by the State of California Department of Real Estate for the project.
- ii. Property Tax – The Housing Department shall use the standard of 1.25% of the Market Price of the unit. In the event that any special assessments bring the property tax rate above 1.25%, the City will utilize the actual property tax rate for the Inclusionary Home.
- iii. Utility Costs – See current Utility Allowance schedule provided by the Santa Clara County Housing Authority. The utility allowance must include heating, cooking, other electric, water heater, water, and garbage, if not included in HOA fees. The utility allowance changes periodically so please check the Santa Clara County Housing Authority website to obtain current information www.hacsc.org.
- iv. Hazard Insurance Cost – If not included in HOA fees, the City will estimate the monthly cost of hazard insurance at \$75. This amount may be adjusted for inflation.
- v. Mortgage Insurance Premium – If the calculated amount of the Developer Discount Loan is not greater than 20% of the Fair Market Value of the property, the Housing Department will establish a market rate Private Mortgage Insurance (PMI) premium corresponding to the rates published by the Federal Housing Administration (FHA).
- vi. Maintenance and Repair Allowance of \$25 per bedroom, per month. This amount may be adjusted for inflation.

- 2) Follow the process below to calculate the amount of the mortgage loan that could be obtained (**Financed Affordable Loan**) based on the amount of monthly Affordable Mortgage

Payment as determined in Step 1 above.

- i. The mortgage loan interest rate shall be based on a 5% down payment, thirty (30) year, fully amortizing fixed rate mortgage based on the Freddie Mac Weekly Mortgage Survey at the time of pricing, as determined by the Housing Department. This mortgage amount does not include any pre-paid points or loan fees.
- ii. Using the Monthly Affordable Mortgage Payment, the interest rate calculated above, and a fully amortized fixed rate mortgage without points or loan fees to determine the maximum Financed Affordable Loan.

3) Add to the Financed Affordable Loan amount determined in Step 2 an assumed amount of borrowers' own funds of 5% for a down payment to determine the **Affordable Sales Price**.

Waiver required under SJMC 5.08.400.B.4

A Developer may apply for limited term waiver of the terms of the subordinate shared appreciation documents required by SJMC Section 5.08.600.A, which shall be granted if the appraised unrestricted market value of an inclusionary home is less than 5% greater than the Affordable Sales Price (as determined from the Affordable Housing Cost). The term of the waiver shall not exceed 6 months. The waiver shall require that the Inclusionary Home be sold at or below the Affordable Sales Price and that the Inclusionary Home shall initially be owner-occupied. In the event that the waiver is granted, requirements of the subordinate shared appreciation documents will be waived and the City will not require income verification for the purchaser.

IX. Homeowner Inclusionary Housing Requirements (SJMC 5.08.600.F)

1) First Time Home Buyer Requirement

Purchasers of Inclusionary Homes must be certified by the Housing Department as First Time Home Buyers. In order to be certified as a First Time Homebuyer, the home buyer must be the unit's Principal Occupant, and cannot hold or have held an Ownership Interest, in whole or in part, of a residential property during the three-year period immediately prior to the home buyer(s) certification of eligibility by the Housing Department to purchase an Inclusionary Home unless one of the following is true:

- i. Is a "displaced homemaker" who within the past two years has not worked on a full-time basis in the labor market, experiencing difficulty in obtaining employment, and has worked primarily without pay to care for the home and family;
- ii. Is a single parent who is unmarried or legally separated from a spouse, is pregnant, or has sole or joint custody of at least one minor child, and does not have an Ownership Interest in residential property; or
- iii. Is a current owner-occupant of a mobile home that does not meet local building codes, and the home cannot be brought into compliance for less than the cost of constructing a new home.

2) Household Composition Definition

The Household is comprised of **all** eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Home. New household members **cannot** be added to the application to income qualify for an Inclusionary Home after initial submission of an application. In addition, the following individuals are not counted as part of the household: foster children, unborn children, children who are subject to a shared-custody agreement, in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the

household at the time of application, and non-related live-in care-takers.

To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria:

- i. All household members who are 18 years of age or more (adult household members) must be included for income qualification purposes documents and must appear on the application to purchase the Inclusionary Home; or
- ii. Any minor individual who is a dependent listed on the most recent year's tax returns of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member.

3) Household Income Limits for Buyers

To establish the eligibility of households who intend to purchase an Inclusionary Home, limits are set on the amount of income households (including all Eligible Household Members) can earn. These limits are based on the AMI and the number of Eligible Household Members.

The Ordinance allows moderate-income households to purchase Inclusionary Homes. Moderate-income households are defined as those with gross incomes between 90% and 110% of AMI. The City publishes the [AMI](#) and the income limits are updated annually.

4) Household Income Definition

Households may not have an income in excess of 110% of AMI (Household Income Limit).

The family size to be used for determining the Household Income Limit is the number of Eligible Household Members. For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12.

In the event that current monthly income deviates by more than 15% from the preceding 12-month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level.

5) Types of Income

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions;
- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets);
- iii. Interest and dividends (including income from assets – see Excluded Income section below);
- iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment;
- v. Payments in lieu of earnings, such as unemployment, disability compensation, and severance pay;

- vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities;
- vii. Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the home;
- viii. All regular pay, special pay, and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and
- ix. Any earned income tax credit to the extent that it exceeds income tax liability.

6) Excluded Income

- i. Casual, sporadic or irregular gifts;
- ii. Amounts that are specifically for, or in reimbursement of, medical expenses;
- iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses;
- iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income;
- v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire;
- vi. Foster child care payments;
- vii. The value of benefits received from the Supplemental Nutrition Assistance Program.
- viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973;
- ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes;
- x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program;
- xi. Payments received from the Job Training Partnership Act; and
- xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians.

7) Determination of Income from Assets

To determine a Household's income eligibility for purchase of an Inclusionary Home, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the of Housing Department website for current [income limits](#). When the total of the Household's assets exceeds the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of:

- i. The actual annual income generated from the assets; or
- ii. 2.5% of all assets in excess of the Household Income Limit.

8) Assets

Assets are defined as:

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds;
- ii. Marketable securities, stocks, bonds, and other forms of capital investment;

- iii. Inheritance and lump sum insurance payments, already received;
- iv. Settlements for personal or property damage already received;
- v. Equity in non-residential real estate such as commercial property and unimproved land, except as described as “not considered asset” iii below; and
- vi. Other personal property that is readily convertible into cash.

The following are not considered assets:

- i. Ordinary household effects including furniture, fixtures, and personal property; ii. Automobiles used for personal use;
- iii. Any deposits on Inclusionary Home (Equity on a parcel or lot on which an Inclusionary Home is to be built); and
- iv. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service.

9) Execution of Subordinate Shared Appreciation Loan Documents; Restrictions (SJMC Section 5.08.600)

Each purchaser will be required to execute a promissory note in favor of the City of San José, secured by a deed of trust for the amount of the Subordinate Shared Appreciation Loan. The City will also require a recorded Affordability Restriction as described in Part IX, Section 10 below and may require execution of a loan agreement and other ancillary documents. The Subordinate Shared Appreciation Loan amount is Developer Discount, which the difference, if any, between the restricted Affordable Sales Price of the Inclusionary Home and its Fair Market Value at the time of the initial sale to the purchaser.

If the property is subsequently transferred to a non-qualified affordable buyer, the Subordinate Shared Appreciation Loan would become due and payable along with a prorated percentage of any equity received in the sale to a non-qualifying buyer under the Ordinance. The Subordinate Shared Appreciation Loan would not become due and payable if the property is sold to a qualified buyer under the Ordinance who agrees to assume the loan, in an arm’s length transaction. If the property is sold to a qualified buyer under the Ordinance who does not agree to assume the loan, then the Subordinate Shared Appreciation Loan would become due and payable along with a prorated percentage of any equity based on the then Fair Market Value of the unit.

The Inclusionary Home shall be the purchaser’s primary place of residence. To be considered as a principal place of residency, the Inclusionary Home must not be rented or leased unless the purchaser has a household hardship and has applied for and obtained an emergency limited term authorization to rent approved by the Director of Housing. In the event that the purchaser fails to comply with this requirement the City may enforce and pursue any and all remedies in law or equity for such violations, including, but not limited to, declaring the Subordinate Shared Appreciation Loan due and payable.

Upon request of the Housing Department, the purchaser of the Inclusionary Home must provide, within 30 days, documents verifying the purchaser’s occupancy of the home as the purchaser’s primary residence, that the home is not rented or leased, and that there have been no changes in the title to the home. Such documents may include but are not limited to utility bills, property tax bills, and mortgage statements reflecting the owners name and address of

the Inclusionary Home. Pursuant to the Subordinate Shared Appreciation Loan documents, an annual submittal will be required thereafter, along with a monitoring fee.

[Note to City: affordability restriction paragraph deleted below because it covered in the Reg Agmnt.]

RECORDING REQUESTED BY:
WHEN RECORDED MAIL TO:

City of San José
Housing Department
200 East Santa Clara Street, T-12
San José, CA 95113
Attention: Inclusionary Housing
Project: _____

APN: _____

No fee for recording pursuant to Government Code Section 27383
(Space above for Recorder's Use)

**FORM OF
INCLUSIONARY HOUSING AGREEMENT**

(Covenant for the Benefit of the City of San José)
[Insert name of Project]

NOTICE: THIS AGREEMENT CONTAINS SUBORDINATION REQUIREMENTS TO
PRESERVE THE PRIORITY OF LAND USE AND AFFORDABLE HOUSING REGULATORY
COVENANTS RESTRICTING SALE OR RENTAL OF DWELLING UNITS

This INCLUSIONARY HOUSING AGREEMENT (“Agreement”) is entered into as of this ____ day of _____, 20__, by and between the CITY OF SAN JOSE, a municipal corporation (the "City"), and _____, a _____ [Insert Name and entity type] (the "Developer"), with reference to the following facts:

A. **This is a form of agreement to be recorded in connection with the implementation of the Developer’s Inclusionary Housing Obligation Program under the Development Agreement.**

B. The Developer is the only owner of the fee interest in certain real property located at _____ [Insert addresses or if none, reference to cross streets] in the City of San José, California and more particularly described in the attached **Exhibit A** (the “Property”) that is the subject of this Agreement. If the Developer is not the only owner of the Property, both the Developer and the Owner (as defined in Section 1 below) must execute and record this Agreement.

C. The Property is located within the boundaries of the Downtown West Planned Development Permit and is subject to the terms and conditions of the Development Agreement.

D. Exhibit D of the Development Agreement is the Affordable Housing Program to which the Developer and the City have agreed as the affordable housing requirements applicable to the Project (the “Affordable Housing Program”) and is a hybrid program based on the City’s Inclusionary Housing Ordinance, San José Municipal Code Chapter 5.08; in effect on the Effective Date, a copy of which is attached to the Development Agreement at Schedule D5 (“Chapter 5.08” or the “Ordinance”) requires projects seeking a planning permit that create new, additional or modified rental or for-sale dwelling units to make fifteen percent (15%) of all such dwelling units available to income eligible households for purchase at an Affordable Housing Cost or for rental at Affordable Rent (as defined below) and that allows, under specified circumstances, alternative means of compliance, and sets forth the Developer’s inclusionary housing obligations and the methods for satisfying those obligations, including by means of on-site inclusionary units, land dedication, and payment of in-lieu fees (the “Inclusionary Obligation”).

E. The Affordable Housing Program includes implementation guidelines at Schedule D2 of the Development Agreement (the “Guidelines”).

D.F. This Agreement, including the attached Exhibits, is intended to set forth the terms and conditions for the implementation of the Developer’s agreement to meet the Inclusionary Obligation in accordance with the Development Agreement’s Exhibit D.

E.G. The Developer is developing a project requiring a planning permit that creates _____ (_____) new, additional or modified rental or for-sale dwelling units on the

Property (“**Total Dwelling Units**”). The project has obtained planning permits designated _____ and _____ [list type of permit, permit number] which were approved by the City of San Jose on _____, 20____. The Developer’s residential project (the “**Project**” or “**Residential Development**”) is described in more detail on the approved Affordable Housing Compliance Plan (“**Compliance Plan**”) dated _____, 20____ and approved on _____, 20____, on file with the City Housing Department a summary of which is attached as **Exhibit B** including the project’s permit information, the total number of dwelling units, whether the units are rental or for-sale, the Developer’s Inclusionary Obligation compliance option election, any exemptions claimed, any contiguous property under common ownership or control, timing of construction, and any requested project phasing.

F.H. This Agreement must be executed and recorded against the Property prior to the ~~earlier of: approval of the first parcel or final subdivision map for the Project or~~ issuance of the first Building Permit needed for vertical construction of the Project. This Agreement must be senior to all deeds of trust or other documents with a power of sale, all mortgages, all judgment liens, and any other liens not in favor of the City (except for liens for property taxes and assessments ~~not~~ yet payable).

G.I. This Agreement includes a restriction on the Sale or Rental of new, additional or modified rental or for-sale dwelling units on the Property.

COVENANTS

NOW, THEREFORE, it is mutually agreed by and between the Developer and the City (the “**Parties**”) as follows:

Section 1. Definitions. All capitalized terms used in this Agreement but not defined shall have the meanings provided in the Ordinance or the guidelines adopted for its implementation. For the purpose of this Agreement, the following terms have the following meanings:

- a) “Affordable Housing Compliance Plan” means Compliance Plan as defined below.
- b) “Affordable Housing Cost” shall have the meaning provided by California Health & Safety Code section 50052.5 for owner-occupied housing.
- c) “Affordable Rent” means rent, which including a reasonable utility allowance, does not exceed:
 1. for very low-income households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit;
 2. for lower income households rents shall be set at an affordable rent as defined in Section 50053 of the Health & Safety Code (the product of 30 percent of 60 percent of the area median income adjusted for family size appropriate for the unit);

~~3.~~

3. Effective May 1, 2021, for on-site moderate income Inclusionary Units rents shall be set at no more than thirty percent (30%) of one hundred percent (100%) of Area Median Income adjusted for family size appropriate for the unit.

d) “Building Permit” includes full structural building permits as well as partial permits such as foundation-only permits.

e) “Compliance Plan” means a plan prepared in compliance with Ordinance requirements for an Affordable Housing Plan and the Compliance Plan requirements in the Guidelines.

f) “Dwelling Unit” shall have the meaning provided in ~~Section 1.2 of the Guidelines Ordinance~~.

g) “For-Sale Development” means a Residential Development with a tentative map, final map, parcel map, condominium plan, or other similar documentation allowing for the creation of separately conveyable dwelling units or interests (such as condominiums, stock cooperatives, or community apartments), and demonstrating compliance with Subdivided Lands Act, including the formation of a Homeowner’s Association prior to issuance of its Certificate of Occupancy.

h) ~~“Guidelines” means the guidelines for the implementation of the Ordinance adopted by City Manager and available for public inspection on the web site of the Department of Housing of the City of San José and in the Department of Housing at 200 E. Santa Clara Street, San Jose, CA 95113.~~ “Guidelines” has the meaning set forth in the Recitals above.

i) ~~“Inclusionary Unit” means a Dwelling Unit required by the Ordinance to be affordable to extremely low-, very low-, lower-, or moderate income households.~~ “H1, H5 and H6 Property” shall have the respective meanings given each term in the Affordable Housing Program.

j) ~~“IHO Fee Credit” shall have the meaning provided in the Affordable Housing Program.~~

k) ~~“Inclusionary Unit” shall have the meaning provided in the Ordinance.~~

l) ~~“In Lieu Fee” means the fee that the Developer may elect to pay to the City in lieu of constructing the Inclusionary Units within the Residential Development consistent with the procedures in the Guidelines Affordable Housing Program and the Ordinance.~~

m) ~~“Ordinance” or “Chapter 5.08” shall have the meaning set forth in the Recitals above for so long as the Development Agreement applies to the Property or Project and thereafter shall mean San José Municipal Code Chapter 5.08.~~

n) ~~“Owner” includes all persons and entities having fee ownership of the Property.~~

o) ~~“Rental Development” means any Residential Development that is not a For-Sale Development.~~

p) ~~“Residential Development” shall have the meaning provided in Section 5.08.250 of the Ordinance.~~

q) ~~“Surplus Inclusionary Units” shall have the meaning provided in Section 5.08.5405.08.255 of the Ordinance.~~

r) ~~“Transfer Agreement” shall mean the applicable Property Transfer~~

Agreement between the City and the Developer (or their respective assignees) for the H1, H5 or H6 Property as applicable.

Section 2. Affirmative Covenants and Warranties

The Developer warrants and covenants as follows:

- a) All of the Developers statements and representations in the Compliance Plan and this Agreement are true and correct.
- b) The Developer shall comply with the compliance option selected in the Compliance Plan (consistent with the Developer's obligations under the Affordable Housing Plan) to meet the Inclusionary Housing Obligation.
- c) The Developer shall record the notice of completion issued for the Residential Development in the Official Records of the County of Santa Clara.
- d) If the Developer shall fail to comply with the requirements of that compliance option within the specified timing, the Developer will ~~provide~~satisfy its Inclusionary ~~Units on-site as rental affordable units consistent with the Affordability Restriction attached hereto as Exhibit C~~Obligations in the manner required in the Affordable Housing Program where the Developer fails to provide or otherwise satisfy the on-site inclusionary requirements or the land dedication obligations under the Affordable Housing Program.
- e) In the event that there is Contiguous Property under Common Ownership or Control, the Developer shall execute and record the City's Covenant for Contiguous Property under Common Ownership or Control in the Official Records of the County of Santa Clara against such Contiguous Property concurrently herewith.
- f) If the compliance option selected by the Developer includes off-site units, credits or otherwise includes commitments regarding other property, the Developer shall execute and record this Agreement in the Official Records of the County of Santa Clara concurrently herewith against all other property required for the specific compliance election made in the Compliance Plan.

Section 3. Authority; Due Diligence Required Prior to Execution of the Agreement.

If the Developer is not the Owner of the Property, this Agreement must be executed by the Developer and the Owner, and the covenants hereunder shall apply to both such parties. Prior to the execution of this Agreement, ownership documentation satisfactory to the City is required and if the Developer or the Owner is not a natural person, documentation satisfactory to the City will be required to establish the existence of the entity, authority to operate in California and delegation of authority for the person(s) signing on behalf of the Developer or Owner.

Section 4. Compliance Option.

- a) The Developer, by the signatures below affirms it has elected in its Compliance Plan to comply with the following Inclusionary Obligation as more specifically described in the Affordable Housing Program, the Ordinance and the Guidelines and summarized in **Exhibit B**~~Provide 15% of Total Dwelling Units as dispersed for sale Inclusionary Units on-site, consistent with the Affordability Restriction(s) attached hereto as Exhibit C;~~
- ~~b) Pay the In-Lieu Fee based on 20% of the Total Dwelling Units;~~~~c)~~

~~d) — Providing the following alternative method of meeting inclusionary housing requirements approved by the City Manager that will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction:~~

1. Provide ~~55.88%~~ of Total Dwelling Units as ~~dispersed~~ moderate income rental Inclusionary Units on-site, consistent with the Affordability Restriction(s) attached hereto as **Exhibit C** and the Affordable Housing Program.
2. ~~Pay the In Lieu Fee based on the square footage of the total development based on having provided 5% of the Total Dwelling Units as onsite moderate rental Inclusionary Units. Dedicate land to the City as credit toward the In Lieu fee obligation, consistent with Exhibit D Section II of the Development Agreement.~~ Close (or be deemed to have closed) the transfer of the H6, H5 or H1 Property, as applicable, under the applicable Transfer Agreement.
3. ~~Allow land dedication no later than the date on which the Temporary Certificate of Occupancy is issue for the first Developer-constructed market rate residential building of the market rate units, consistent~~ Apply the applicable IHO Fee Credits to satisfy any applicable remaining inclusionary housing requirements in accordance with Exhibit D Section III of the Development Agreement. the Affordable Housing Program.
4. If Developer has (i) not accrued any IHO Fee Credits or (ii) exhausted all the credit attributable to the dedication of H1, H5 and H6, as applicable, then Developer shall pay IHO Fees in the amount of (a) \$18.70 per rsf for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI) or (b) \$43.00 per rsf if Developer does not provide the 5% on-site inclusionary units, as more specifically set forth in the Affordable Housing Program, including the provisions regarding Annual Increases.

4.b) During the term of the Development Agreement, allow the Developer to request conversion of the 100% AMI rental units to units for-sale at an affordable sales price based on 100% AMI, consistent with Exhibit D Section III of the Development Agreement.

~~5. — Provide community benefits to the City in the form of 30 additional moderate income housing units and the dedication of the Autumn Street parcels that may potentially be used for affordable housing development in the future, consistent with Exhibit C and Exhibit D Section III of the Development Agreement. The mere mapping of the units consistent with a For Sale Development shall not cause the units to be treated as a For Sale Development unless and until Developer lists the units for sale.~~

Section 5. Covenants to Run with the Land

The Developer hereby subjects the Property and the Project to the covenants and restrictions set forth in this Agreement. Developer hereby declares its express intent that the covenants and restrictions set forth herein shall be deemed covenants running with the land and shall pass to and be binding upon the Developer's successors in interest. All provisions of this Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors-in-interest, transferees, and assigns of Developer and the City, regardless of any voluntary or involuntary conveyance or transfer of the Property. Except as provided in any written agreement executed by

City, each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring the Property or improvements constructed on the Property or any portion thereof or interest therein (a “Contract”) shall conclusively be held to have been executed, delivered and accepted subject to this Agreement regardless of whether the terms of this Agreement are set forth in such Contract and regardless of whether the other party or parties to such Contract have actual knowledge of this Agreement.

Developer and the City hereby declare their understanding and intent that:

- a) the covenants and restrictions contained in this Agreement shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Developer; and
- b) the burden of the covenants and restrictions set forth in this Agreement touch and concern the Property in that the Developer’s legal interest in the Property and all improvements thereon are rendered less valuable thereby; and
- c) the benefit of the covenants and restrictions set forth in this Agreement touch and concern the land by enhancing and increasing the potential enjoyment and use of the Property and Units by Moderate, Low and Very Low Income Households, the intended beneficiaries of such covenants and restrictions.

Section 6. Release of Project Units from Agreement. The covenants and conditions herein contained shall apply to and bind, during their respective periods of fee ownership, Developer and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property until rescinded in accordance with Section 12 below.

Except with respect to any portions of the Property which are released from the burdens of this Agreement by a rescission or partial rescission executed by the City; the Owner of the Property shall expressly make the conditions and covenants contained in this Agreement a part of any deed or other instrument conveying any interest in such property.

Section 7. Default.

¶

a) During Development Agreement. So long as the Property is subject to the terms of the Development Agreement, Article 9 (Enforcement of Agreement; Default; Remedies) of the Development Agreement regarding default and remedies shall apply and control with respect to any failure of the Developer to perform its obligations under this Agreement and Sections 7.b and 8 below shall not apply during such time. ¶

¶

b) Following Development Agreement. Following the expiration or sooner termination of the Development Agreement or at such other time as the Development Agreement no longer applies to the Property, then the following provisions with respect to default shall control:¶

Failure of the Developer to cure any default in the Developer's obligations under the terms of this Agreement within thirty (30) days after the delivery of a notice of default from the City will constitute a default under this Agreement and a failure to satisfy the Conditions of Approval with respect to the Project and Property and the requirements of the Ordinance and Guidelines and, in addition to remedies for breach of this Agreement, the City may exercise any and all remedies available to it under the Subdivision Map Act, Chapter 5.08, or otherwise, with respect to the Developer's failure to satisfy the Conditions of Approval and the requirements of Chapter 5.08 including but not limited to:

- (a) withholding, conditioning, suspending or revoking any permit, license, subdivision approval or map, or other entitlement for the ~~Developer's project~~ Project including without limitation final inspections for occupancy and/or certificates of occupancy;
- (b) instituting against the Developer, or other parties, a civil action for declaratory relief, injunction or any other equitable relief, or relief at law, including without limitation an action to rescind a transaction and/or to require repayment of any funds received in connection with such a violation;
- (c) where one or more persons have received financial benefit as a result of violation of this Agreement or of any requirement imposed under Chapter 5.08, the City may assess, and institute legal action to recover as necessary, a penalty in any amount up to and including the amount of financial benefit received, in addition to recovery of the benefit received;
- (d) prosecuting a misdemeanor against any person who has rented a residential unit at a rent exceeding the maximum allowed under this Agreement or to a household not qualified under this Agreement, or who has otherwise violated Chapter 5.08, or any other agreement, restriction or requirement authorized or imposed under Chapter 5.08;
- (e) remedies set forth in this Agreement (such as the remedies described in **Exhibit C**); or
- (f) any other means authorized by state law or the City's Municipal Code.

Section 8. Remedies Cumulative. No right, power, or remedy given to the City by the terms of this Agreement, the Regulatory Agreement or Chapter 5.08 is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such document, Chapter 5.08, or by any statute or otherwise against Developer and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

Section 9. Hold Harmless. Developer will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (collectively, the "**Indemnitees**"), and any of them, from and against all loss, all risk of loss and all damage (including expense) and all liability sustained or incurred because of or by reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the Inclusionary Units, or Developer's performance or non-performance under this Agreement, and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising from the gross negligence or willful misconduct of the City. The provisions of this section shall survive expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this section shall remain in full force and effect. Notwithstanding the foregoing, so long as the Property is subject to the terms of the Development Agreement, Section 4.9 (Indemnification of City) of the Development Agreement (and not this Section 9) shall apply and control with respect to any obligation of the Developer to indemnify, reimburse or hold harmless the City and any City Parties with respect to any Losses (as such terms are defined in such Section 4.9).

Section 10. Notices. All notices required pursuant to this Agreement shall be in writing and may be given by reputable overnight delivery service for next business day delivery or by registered or certified mail, return receipt requested, to the party to receive such notice at the addressed set forth below:

TO THE CITY:

City of San José
Department of Housing
200 East Santa Clara Street, T-12
San José, CA 95113
Attn: Inclusionary Housing

cc:

City of San José
City Attorney's Office
200 East Santa Clara Street, T-16
San José, CA 95113
Attn: Housing Attorney

TO THE DEVELOPER:

Attn: _____

Any party may change the address to which notices are to be sent by notifying the other parties of the new address, in the manner set forth above.

Section 11. Integration-This; Conflict with Development Agreement. The Development Agreement; this Agreement with all of its recitals and exhibits, together with the Compliance Plan; any documents to be executed for the implementation of the Developer's Inclusionary Obligation including, but not limited to, documents to be recorded against any off-site property; and any covenant recorded on Contiguous Property under Common Ownership and Control embody the agreement between City and Developer for the Residential Development's compliance with the Inclusionary Affordable Housing Program, the Ordinance, the Development Agreement and its their respective terms and conditions. No verbal agreements or conversations with any officer, agent or employee of City prior to the execution of this Agreement, shall affect or modify any of the terms or obligations contained in this Agreement. If there is a conflict between the Development Agreement, including the Affordable Housing Program, and this Agreement, the Compliance Plan, or the Ordinance, then the Development Agreement shall control.

Section 12. Duration and Amendment of Agreement: Rescission. This Agreement shall remain in effect until the ninety-~~nineth~~ninth (99th) anniversary date of the recording of the notice of completion for the Residential Development. If a unit becomes a For-Sale unit and, in connection therewith, a new form of Inclusionary Housing Agreement, Compliance Agreement or restrictive covenant is entered into with respect to such unit(s), then the amount of time such unit(s) was restricted as a rental Restricted Unit shall count toward the For-Sale restricted term. It may be rescinded by the City after Developer's compliance with the Inclusionary Obligation. This Agreement, and any section, subsection, or covenant contained herein, may be amended only upon the written consent of the City Manager who shall have authority to approve or disapprove minor or technical amendments on behalf of the City consistent with the Ordinance and Guidelines. If the amendment makes a substantive or material change to this Agreement it shall be effective only if the change is consistent with the Ordinance and Guidelines and following approval of the City authority that gave the First Approval for the Project and the City Manager. This Agreement shall not be amended without any necessary amendments to applicable Planning Permits and payment of any transaction fees.

Section 13. Recitals and Exhibits Incorporated. All of the above Recitals, all Exhibits, and the Compliance Plan are hereby incorporated in this Agreement and made a part hereof.

Section 14. Applicable Law. This Agreement shall be governed by the law of the State of California.

Section 15. Waivers. Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer by the City Manager to perform any obligation under this Agreement shall not operate as a waiver or release from any of its

obligations under this Agreement. Consent by the City to any act or omission by the Developer shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

Section 16. Title of Parts and Sections. Any titles of the sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

Section 17. Multiple Originals; Counterpart. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

Section 18. Recording of Agreement. The Developer shall cause this Agreement to be recorded against the Property and any other Property required for satisfaction of the compliance option in the Developer's Compliance Plan in the Official Records of the County of Santa Clara.

Section 19. Severability. In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless, be and remain in full force and effect.

Section 20. Time of Essence. Time is of the essence of every provision hereof in which time is a factor.

Section 21. Exhibits. The following exhibits are attached to this Agreement:

Exhibit A	Legal Description of the Property
Exhibit B	Summary of the Project and Compliance Plan
Exhibit C	Affordability Restrictions

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed

Developer:

_____,
a _____

By: _____

Name: _____

Its: _____

Date: _____

If the Developer is not the sole owner, the Owner consents to the recording of the Agreement:

Owner: *[List all parties on title]*

a _____

By: _____

Name: _____

Its: _____

Date: _____

_____,
a _____

By: _____

Name: _____

Its: _____

Date: _____

Signatures must be notarized. Signatures continue on following page(s)

City of San José, a municipal corporation

By: _____

Name: _____

Its: _____

Date: _____

Approved as to form:

Senior Deputy City Attorney



A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of _____

County of _____

On _____ before me, _____, Notary Public, personally

DATE

NAME OF NOTARY

appeared _____

NAME(S) OF SIGNER(S)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledge to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

SIGNATURE OF NOTARY



CPDB Edits

4/16/21

Subject to Developer review and comment

Negotiation Period Privilege; CPRA Confidential Treatment Request;

Not for Public Release – CPRA Exempt;

Confidential and Proprietary Business-Siting Information

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

EXHIBIT B
SUMMARY OF PROJECT AND
COMPLIANCE PLAN

This Exhibit summarizes and provides notice of the Compliance Plan executed by the Developer and on file with the Housing Department.

1.The Project's permit numbers, permit types, permit application and approval dates:

2.The total number of dwelling units: _____

3.Whether the project is anticipated to be rental or for-sale: _____

4.The Developer's Inclusionary Housing Ordinance Obligation compliance option election:

4.Any requirements that apply to other property based on the Developer's Inclusionary Housing Ordinance Obligation compliance option election: _____

5. List of any exemptions from the Inclusionary Housing Ordinance claimed in the Compliance Plan, any evidence submitted and whether the exemption was approved by City Manager. _____

5. List of any contiguous property under common ownership or control by address and APN _____

6. List any existing structures on the property, if the residential project includes any conversion or demolition _____

~~7. List any project phasing requested in the Compliance Plan, _____, including the anticipated number of final maps.~~

8. Summarize the timetable submitted showing timing of construction. _____

EXHIBIT C**AFFORDABILITY RESTRICTION****1. Affordability Restriction (Rental).**

(a) Restriction to Affordable Rent. For a period commencing upon the recordation of this Agreement and ending on the 99th anniversary of the recordation of the Notice of Completion for the Project, or, if no Notice of Completion is recorded on the Project, until the sixtieth (60th) anniversary of the recording of this Agreement, not less than five percent (~~5~~**5.88**%) of the Total Dwelling Units shall be rented or otherwise made available at Affordable Rent to Moderate Income Households.

(b) A person or family shall be determined to be eligible (an “Eligible Household”) to rent an Inclusionary Unit if the household income does not exceed on the maximum income level for a Moderate Income Household as required for that specific Inclusionary Unit.

(c) In adjusting for unit size to determine the maximum Affordable Rent, the following adjustments to the Area Median Income shall be made based on the number of bedrooms in the Inclusionary Unit: studio - one person, one bedroom - two persons, two bedrooms - three persons, three bedrooms - four persons, and four bedrooms - five persons. In the event that the Residential Development has or obtains Low Income Housing Tax Credits, after notice to the City these adjustments for assumed household size may be modified for new tenants to reflect federal unit size adjustments based on 1-1/2 persons per bedroom consistent with Health and Safety Code Section 50053. **EXHIBIT C-1** attached hereto and incorporated herein by this reference contain illustrations of the calculation of Affordable Rent for a rental unit for Moderate Income Households.

(d) Developer shall prohibit any person or family who has not been determined to be an Eligible Household at the time of taking possession, renting or occupying any Inclusionary Unit and shall cause any such person or family to vacate any Inclusionary Unit so rented or occupied. When an Inclusionary Unit is vacated, for any reason whatsoever, the Inclusionary Unit shall then again be rented or otherwise made available at Affordable Rent to Moderate Income as specified for the unit. For the purposes of this Agreement, “vacate” shall include, without limitation, departure from an Inclusionary Unit at the termination (whether at the end of a term or upon default) of the lease pursuant to which the Inclusionary Unit was occupied (“Lease”), abandonment of the Inclusionary Unit, sublease or assignment of an Inclusionary Unit (whether or not such sublease or assignment complied with the terms and conditions of the Lease).

(e) Recertification of Income. On an annual basis, Developer shall submit a report (the “Annual Report”) to the City, which contains, with respect to each Inclusionary Unit, the rental rate and income and family size of the tenant household. The Annual Report shall be based on information supplied by the tenant or occupant of each Inclusionary Unit in a certified statement on a form provided or previously approved by the City.

2. Definitions. The definitions of Area Median Income, Lower (or Low) Income Household,

Very Low Income Household, and Extremely Low Income Household shall have the definitions given these terms in Health and Safety Code Sections 50052.5, 50053, 50079.5, 50105, 50106 and 50093, as amended from time to time.

3. Default and Remedies.

(a) Non-Complying Units. In addition to and without limitation of any other rights and remedies set forth in this Agreement or otherwise available to any party legally entitled to enforce this Agreement, in the event of any Default (as defined below), after thirty (30) day notice by City to Developer, and Developer's failure to cure within such thirty (30)-day period City shall have the right to lease and Developer shall lease to City on demand for a rental of \$1.00 per Inclusionary Unit per year any and all of the "Non-Complying Inclusionary Units" (as defined below) at such time as the Non-Complying Inclusionary Unit(s) is vacated. "Non-Complying Inclusionary Units" shall mean an Inclusionary Unit which is occupied and/or leased in violation of this Agreement. Determination of such a violation may be based on information provided in the Annual Report or determined by City in its reasonable discretion based on information otherwise available to it. Notwithstanding any term or condition of the lease under which the City leases a Non-Complying Inclusionary Unit pursuant to this subsection, Developer hereby consents to and grants City the right to assign such lease or sublet such Inclusionary Unit(s) to a Moderate Income Household, as appropriate, at Affordable Rent or to any non-profit housing provider (a "Provider") in the community for \$1.00 per year on the condition that such Provider subleases such Inclusionary Unit(s) or assigns such lease(s) to Moderate Income Household, as appropriate, at Affordable Rent. If the City assigns or sublets to any Provider, the Developer hereby consents to and grants such Provider the right to assign such lease or sublet such Inclusionary Unit to any Eligible Household at an Affordable Rent. If the City leases any Inclusionary Unit(s) or a Provider subleases any Inclusionary Unit(s) or is the assignee of any lease(s) from the City, the City or Provider, as the case may be, to the extent necessary to ensure compliance with this Agreement, shall sublease such Inclusionary Unit(s) or assign such lease(s) to any Eligible Household at Affordable Rent. Any rent paid under such a sublease or assignment shall be paid to the Developer after the City or Provider, as the case may be, has been reimbursed for any expenses incurred by it in connection with exercising the rights and remedies set forth in this subsection; provided, that if the Developer is in default under any loan documents in connection with the financing of the Property or any improvements thereon, such rent shall be paid to the party legally entitled thereto.

(c) Excess Rent. In the event that and to the extent that the Developer receives rents or other payments from the operation of the Inclusionary Units or other improvements constructed on the Property in excess of what is permitted to charge and receive pursuant to this Agreement, after thirty (30) day notice by City to Developer, Developer agrees and covenants to pay to the City the full amount of such excess immediately on demand by the City. Developer and the City agree and intend that the payment of such excess, absent other remedies described in this Agreement to ensure for the term hereof that rents or other payments do not exceed those Developer is permitted to charge and receive pursuant to this Agreement, shall not alone be an adequate remedy to accomplish the purposes of this Agreement

(d) All Remedies Available and Cumulative. In the event of any breach of any of the covenants or restrictions set forth ~~herein~~ in this Exhibit C (a “Default”), the City or members of the community (as defined in the Health and Safety Code) shall have the right to exercise all the rights and remedies, and to maintain any action at law or suits in equity or other real property proceedings, including without limitation, specific performance, to enforce the covenants and restrictions and the curing of any breach or violation thereof. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of the City to enforce the provisions hereof in the future for any continuing or new breach or violation of any of the covenants or restrictions contained in this Agreement. All rights and remedies, including without limitation those set forth in paragraphs 3(a) through (c) above, of any party legally entitled to enforce this Agreement shall be cumulative and the exercise of any such right or remedy shall not impair or prejudice and shall not be a waiver of the right to exercise any other such rights and remedies.

4. Reporting. In addition to the Annual Report, Developer shall provide all information reasonably requested by the City (not more frequently than once per calendar quarter) with respect to the number of Units in the Property and the income levels of the persons or families renting or otherwise occupying the Units.

5. Restriction to be Attached. Developer shall attach a copy of this Exhibit C to any lease or purchase and sale contract with respect to any Inclusionary Unit.

6. Transfer of Inclusionary Units. During the term of this Agreement, Developer must give written notice to the City at least 90 days in advance of any sale, agreement to sell, assignment, conveyance, lease (other than the rental or lease of Inclusionary Units to Eligible Households), or transfer of the Inclusionary Units or any part thereof, including the sale of any general partnership interests, the removal of any general partner, or any substantial change in operational or management control over the Inclusionary Units.

7. Monitoring. The City shall have the right to take such actions to monitor compliance with this Agreement as it deems necessary, including but not limited to reasonable requests for documents.

8. Monitoring Fees. Developer shall pay annual monitoring fees to the City in advance on or prior to July 1 consistent with the amount set forth in the City’s Schedule of Fees and Charges. As of 2020-2021, the fee is \$41.65 per Inclusionary Unit to City.

9. Property Damage or Destruction. If any of the Inclusionary Units or access thereto is damaged or destroyed, Developer must notify the City within 30 days and must at its own cost and expense, repair or restore the Inclusionary Units. Such work shall be commenced within 120 days after the damage or loss occurs and shall be completed within one year thereafter. All insurance proceeds collected for such damage or destruction shall be applied to the cost of such repairs or restoration. In the event that the Inclusionary Units are not rentable during this time, the term of this Agreement shall be extended by the period of time that any of the Inclusionary Units were not rented to and occupied by eligible households.

10. No Discrimination. The Developer covenants and agrees for itself, its heirs, successors, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the Property. The foregoing covenants shall run with the land.

All deeds, leases, and contracts for the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, or any portion thereof made or entered into by Developer, its successors or assigns, shall contain therein the following language:

(a) In Deeds:

"The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

(b) In Leases:

"The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions that there shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees,

subtenants, or vendees in the premises herein leased.”

(c) In Contracts:

"The contractor herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through it, and this contract is made and accepted upon and subject to the conditions that there shall be no discrimination against or segregation of any person or of a group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the property herein transferred nor shall the contractor or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees in the Property. The foregoing provisions shall be binding upon and shall obligate the contractor and any subcontracting parties, successors, assigns and other transferees under the contract."

EXHIBIT C-1

The following hypothetical illustrates the calculation of Affordable Rent **for a Moderate Income Households** (as defined in the Ordinance) who are **Renting** a Moderate Income Inclusionary one-bedroom unit with an assumed family size of 2 persons in Santa Clara County.

Assumptions.

1. Inclusionary Unit to be made available to Moderate Income Households.
2. Family Size = 2 Persons (for purposes of this example)
3. Person or Family need not have the maximum income for a Person or Family in the income category (adjusted for family size).
4. Electricity charges are separately metered and directly billed to the tenants by PG&E. A reasonable allowance for such charges based on the Utility Allowance Schedule published by the County of Santa Clara Housing Authority ("Allowance") is deducted.

As of April 2020, per 25 California Code of Regulations ("CCR") Section 6932, median income for a family of 2 is \$113,300 ("Area Median Income adjusted for family size") and the maximum income level for a Moderate Income Household with a family size of 2 in Santa Clara County is \$135,900 (100% of the Area Median Income adjusted for family size).

Pursuant to 25 CCR Section 6918, rent (for the purposes of this Exhibit defined as "Rent") includes, among other things, payment for use or occupancy of a housing unit and charges or fees charged or passed through by the landlord other than security deposits). Pursuant to Section 50053 of the Health and Safety Code and this Restriction, the Rent paid by a Moderate Income Household for a Moderate Income Inclusionary Unit shall not exceed 30% of 100% of the Area Median Income adjusted for family size.

CALCULATION OF RENT CHARGEABLE:

\$135,900	[100% of the area median income adjusted for family size (2 persons)]
<u>X .30</u>	[Rent cannot exceed 30% of 100% of area median income]
\$40,770.00	

\$ 3,397.50	divided by 12 [to calculate the maximum <u>monthly</u> Rent]
<u>-\$ 74.00</u>	[Assumed allowance for an all electric 1 bedroom apartment.]

\$ 3,323.50 [Maximum Rent after reasonable allowance for electric charges.]

As this hypothetical illustrates, as of April 2020, no Moderate Income Household with a family size of 2 that pays its own electric bill should be charged or pay Rent in excess of \$3,397.50 per month minus less the approved utility allowance; this amount may be adjusted as the CCR Sections above are amended or the reasonable allowance amount is adjusted.

RECORDING REQUESTED BY:
WHEN RECORDED MAIL TO:

City of San José
Housing Department
200 East Santa Clara Street, T-12
San José, CA 95113
Attention: Inclusionary Housing
Project: _____

APN: _____

No fee for recording pursuant to Government Code Section 27383
(Space above for Recorder's Use)

FORM OF
INCLUSIONARY HOUSING AGREEMENT

(Covenant for the Benefit of the City of San José)
[Insert name of Project]

NOTICE: THIS AGREEMENT CONTAINS SUBORDINATION REQUIREMENTS TO
PRESERVE THE PRIORITY OF LAND USE AND AFFORDABLE HOUSING REGULATORY
COVENANTS RESTRICTING SALE OR RENTAL OF DWELLING UNITS

This INCLUSIONARY HOUSING AGREEMENT (“Agreement”) is entered into as of this _____ day of _____, 20____, by and between the CITY OF SAN JOSE, a municipal corporation (the “City”), and _____, a _____ [Insert Name and entity type] (the “Developer”), with reference to the following facts:

A. **This is a form of agreement to be recorded in connection with the implementation of the Developer’s Inclusionary Housing Program under the Development Agreement.**

B. The Developer is the only owner of the fee interest in certain real property located at _____ [Insert addresses or if none, reference to cross streets] in the City of San José, California and more particularly described in the attached **Exhibit A** (the “Property”) that is the subject of this Agreement. If the Developer is not the only owner of the Property, both the Developer and the Owner (as defined in Section 1 below) must execute and record this Agreement.

C. The Property is located within the boundaries of the Downtown West Planned Development Permit and is subject to the terms and conditions of the Development Agreement.

D. Exhibit D of the Development Agreement is the Affordable Housing Program to which the Developer and the City have agreed as the affordable housing requirements applicable to the Project (the “Affordable Housing Program”) and is a hybrid program based on the City’s Inclusionary Housing Ordinance, San José Municipal Code Chapter 5.08 in effect on the Effective Date, a copy of which is attached to the Development Agreement at Schedule D5 (“Chapter 5.08” or the “Ordinance”), and sets forth the Developer’s inclusionary housing obligations and the methods for satisfying those obligations, including by means of on-site inclusionary units, land dedication, and payment of in-lieu fees (the “Inclusionary Obligation”).

E. The Affordable Housing Program includes implementation guidelines at Schedule D2 of the Development Agreement (the “Guidelines”).

F. This Agreement, including the attached Exhibits, is intended to set forth the terms and conditions for the implementation of the Developer’s agreement to meet the Inclusionary Obligation in accordance with the Development Agreement’s Exhibit D.

G. The Developer is developing a project requiring a planning permit that creates _____ (_____) new, additional or modified rental or for-sale dwelling units on the Property (“Total Dwelling Units”). The project has obtained planning permits designated _____ and _____ [list type of permit, permit number] which were approved by the City of San Jose on _____, 20____. The Developer’s residential project (the “Project” or “Residential Development”) is described in more detail on the approved Affordable Housing Compliance Plan (“Compliance Plan”) dated _____, 20____ and approved on _____, 20____, on file with the City Housing Department a summary of which is attached

as **Exhibit B** including the project's permit information, the total number of dwelling units, whether the units are rental or for-sale, the Developer's Inclusionary Obligation compliance option election, any exemptions claimed, any contiguous property under common ownership or control, timing of construction, and any requested project phasing.

H. This Agreement must be executed and recorded against the Property prior to the issuance of the first Building Permit needed for vertical construction of the Project. This Agreement must be senior to all deeds of trust or other documents with a power of sale, all mortgages, all judgment liens, and any other liens not in favor of the City (except for liens for property taxes and assessments not yet payable).

I. This Agreement includes a restriction on the Sale or Rental of new, additional or modified rental or for-sale dwelling units on the Property.

COVENANTS

NOW, THEREFORE, it is mutually agreed by and between the Developer and the City (the "**Parties**") as follows:

Section 1. Definitions. All capitalized terms used in this Agreement but not defined shall have the meanings provided in the Ordinance or the guidelines adopted for its implementation. For the purpose of this Agreement, the following terms have the following meanings:

- a) "Affordable Housing Compliance Plan" means Compliance Plan as defined below.
- b) "Affordable Housing Cost" shall have the meaning provided by California Health & Safety Code section 50052.5 for owner-occupied housing.
- c) "Affordable Rent" means rent, which including a reasonable utility allowance, does not exceed:
 - 1. for very low-income households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit;
 - 2. for lower income households rents shall be set at an affordable rent as defined in Section 50053 of the Health & Safety Code (the product of 30 percent of 60 percent of the area median income adjusted for family size appropriate for the unit);
 - 3. Effective May 1, 2021, for on-site moderate income Inclusionary Units rents shall be set at no more than thirty percent (30%) of one hundred percent (100%) of Area Median Income adjusted for family size appropriate for the unit.
- d) "Building Permit" includes full structural building permits as well as partial permits such as foundation-only permits.
- e) "Compliance Plan" means a plan prepared in compliance with Ordinance requirements for an Affordable Housing Plan and the Compliance Plan requirements in the Guidelines.

- f) “Dwelling Unit” shall have the meaning provided in the Ordinance.
- g) “For-Sale Development” means a Residential Development with a tentative map, final map, parcel map, condominium plan, or other similar documentation allowing for the creation of separately conveyable dwelling units or interests (such as condominiums, stock cooperatives, or community apartments), and demonstrating compliance with Subdivided Lands Act, including the formation of a Homeowner’s Association prior to issuance of its Certificate of Occupancy.
- h) “Guidelines” has the meaning set forth in the Recitals above.
- i) “H1, H5 and H6 Property” shall have the respective meanings given each term in the Affordable Housing Program.
- j) “IHO Fee Credit” shall have the meaning provided in the Affordable Housing Program.
- k) “Inclusionary Unit” shall have the meaning provided in the Ordinance.
- l) “In Lieu Fee” means the fee that the Developer may elect to pay to the City in lieu of constructing the Inclusionary Units within the Residential Development consistent with the Affordable Housing Program and the Ordinance.
- m) “Ordinance” or “Chapter 5.08” shall have the meaning set forth in the Recitals above for so long as the Development Agreement applies to the Property or Project and thereafter shall mean San José Municipal Code Chapter 5.08.
- n) “Owner” includes all persons and entities having fee ownership of the Property.
- o) “Rental Development” means any Residential Development that is not a For-Sale Development.
- p) “Residential Development” shall have the meaning provided in Section 5.08.250 of the Ordinance.
- q) “Surplus Inclusionary Units” shall have the meaning provided in Section 5.08.255 of the Ordinance.
- r) “Transfer Agreement” shall mean the applicable Property Transfer Agreement between the City and the Developer (or their respective assignees) for the H1, H5 or H6 Property as applicable.

Section 2. Affirmative Covenants and Warranties

The Developer warrants and covenants as follows:

- a) All of the Developers statements and representations in the Compliance Plan and this Agreement are true and correct.
- b) The Developer shall comply with the compliance option selected in the Compliance Plan (consistent with the Developer’s obligations under the Affordable Housing Plan) to meet the Inclusionary Housing Obligation.
- c) The Developer shall record the notice of completion issued for the Residential Development in the Official Records of the County of Santa Clara.
- d) If the Developer shall fail to comply with the requirements of that compliance option within the specified timing, the Developer will satisfy its Inclusionary Obligations in the manner required in the Affordable Housing Program where the Developer fails to provide or otherwise satisfy the on-site inclusionary requirements or the land dedication obligations under the Affordable Housing Program.

- e) In the event that there is Contiguous Property under Common Ownership or Control, the Developer shall execute and record the City's Covenant for Contiguous Property under Common Ownership or Control in the Official Records of the County of Santa Clara against such Contiguous Property concurrently herewith.
- f) If the compliance option selected by the Developer includes off-site units, credits or otherwise includes commitments regarding other property, the Developer shall execute and record this Agreement in the Official Records of the County of Santa Clara concurrently herewith against all other property required for the specific compliance election made in the Compliance Plan.

Section 3. Authority; Due Diligence Required Prior to Execution of the Agreement.

If the Developer is not the Owner of the Property, this Agreement must be executed by the Developer and the Owner, and the covenants hereunder shall apply to both such parties. Prior to the execution of this Agreement, ownership documentation satisfactory to the City is required and if the Developer or the Owner is not a natural person, documentation satisfactory to the City will be required to establish the existence of the entity, authority to operate in California and delegation of authority for the person(s) signing on behalf of the Developer or Owner.

Section 4. Compliance Option.

- a) The Developer, by the signatures below affirms it has elected in its Compliance Plan to comply with the following Inclusionary Obligation as more specifically described in the Affordable Housing Program, the Ordinance and the Guidelines and summarized in **Exhibit B**:
1. Provide 5.88% of Total Dwelling Units as moderate income rental Inclusionary Units on-site, consistent with the Affordability Restriction(s) attached hereto as **Exhibit C** and the Affordable Housing Program.
 2. Close (or be deemed to have closed) the transfer of the H6, H5 or H1 Property, as applicable, under the applicable Transfer Agreement.
 3. Apply the applicable IHO Fee Credits to satisfy any applicable remaining inclusionary housing requirements in accordance with the Affordable Housing Program.
 4. If Developer has (i) not accrued any IHO Fee Credits or (ii) exhausted all the credit attributable to the dedication of H1, H5 and H6, as applicable, then Developer shall pay IHO Fees in the amount of (a) \$18.70 per rsf for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI) or (b) \$43.00 per rsf if Developer does not provide the 5% on-site inclusionary units, as more specifically set forth in the Affordable Housing Program, including the provisions regarding Annual Increases.
- b) During the term of the Development Agreement, allow the Developer to request conversion of the 100% AMI rental units to units for-sale at an affordable sales price based on 100% AMI, consistent with Exhibit D Section III of the Development Agreement. The mere mapping of the units consistent with a For Sale Development shall not cause the units to be treated as a For Sale Development unless and until Developer lists the units for sale.

Section 5. Covenants to Run with the Land

The Developer hereby subjects the Property and the Project to the covenants and restrictions set forth in this Agreement. Developer hereby declares its express intent that the covenants and

restrictions set forth herein shall be deemed covenants running with the land and shall pass to and be binding upon the Developer's successors in interest. All provisions of this Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors-in-interest, transferees, and assigns of Developer and the City, regardless of any voluntary or involuntary conveyance or transfer of the Property. Except as provided in any written agreement executed by City, each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring the Property or improvements constructed on the Property or any portion thereof or interest therein (a "Contract") shall conclusively be held to have been executed, delivered and accepted subject to this Agreement regardless of whether the terms of this Agreement are set forth in such Contract and regardless of whether the other party or parties to such Contract have actual knowledge of this Agreement.

Developer and the City hereby declare their understanding and intent that:

- a) the covenants and restrictions contained in this Agreement shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Developer; and
- b) the burden of the covenants and restrictions set forth in this Agreement touch and concern the Property in that the Developer's legal interest in the Property and all improvements thereon are rendered less valuable thereby; and
- c) the benefit of the covenants and restrictions set forth in this Agreement touch and concern the land by enhancing and increasing the potential enjoyment and use of the Property and Units by Moderate, Low and Very Low Income Households, the intended beneficiaries of such covenants and restrictions.

Section 6. Release of Project Units from Agreement. The covenants and conditions herein contained shall apply to and bind, during their respective periods of fee ownership, Developer and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property until rescinded in accordance with Section 12 below.

Except with respect to any portions of the Property which are released from the burdens of this Agreement by a rescission or partial rescission executed by the City; the Owner of the Property shall expressly make the conditions and covenants contained in this Agreement a part of any deed or other instrument conveying any interest in such property.

Section 7. Default.

- a) During Development Agreement. So long as the Property is subject to the terms of the Development Agreement, Article 9 (Enforcement of Agreement; Default; Remedies) of the Development Agreement regarding default and remedies shall apply and control with respect to any failure of the Developer to perform its obligations under this Agreement and Sections 7.b and 8 below shall not apply during such time.
- b) Following Development Agreement. Following the expiration or sooner

termination of the Development Agreement or at such other time as the Development Agreement no longer applies to the Property, then the following provisions with respect to default shall control:

Failure of the Developer to cure any default in the Developer's obligations under the terms of this Agreement within thirty (30) days after the delivery of a notice of default from the City will constitute a default under this Agreement and a failure to satisfy the Conditions of Approval with respect to the Project and Property and the requirements of the Ordinance and Guidelines and, in addition to remedies for breach of this Agreement, the City may exercise any and all remedies available to it under the Subdivision Map Act, Chapter 5.08, or otherwise, with respect to the Developer's failure to satisfy the Conditions of Approval and the requirements of Chapter 5.08 including but not limited to:

- (a) withholding, conditioning, suspending or revoking any permit, license, subdivision approval or map, or other entitlement for the Project including without limitation final inspections for occupancy and/or certificates of occupancy;
- (b) instituting against the Developer, or other parties, a civil action for declaratory relief, injunction or any other equitable relief, or relief at law, including without limitation an action to rescind a transaction and/or to require repayment of any funds received in connection with such a violation;
- (c) where one or more persons have received financial benefit as a result of violation of this Agreement or of any requirement imposed under Chapter 5.08, the City may assess, and institute legal action to recover as necessary, a penalty in any amount up to and including the amount of financial benefit received, in addition to recovery of the benefit received;
- (d) prosecuting a misdemeanor against any person who has rented a residential unit at a rent exceeding the maximum allowed under this Agreement or to a household not qualified under this Agreement, or who has otherwise violated Chapter 5.08, or any other agreement, restriction or requirement authorized or imposed under Chapter 5.08;
- (e) remedies set forth in this Agreement (such as the remedies described in **Exhibit C**); or
- (f) any other means authorized by state law or the City's Municipal Code.

Section 8. Remedies Cumulative. No right, power, or remedy given to the City by the terms of this Agreement, the Regulatory Agreement or Chapter 5.08 is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such document, Chapter 5.08, or by any statute or otherwise against Developer and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any

other right or remedy.

Section 9. Hold Harmless. Developer will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (collectively, the "**Indemnitees**"), and any of them, from and against all loss, all risk of loss and all damage (including expense) and all liability sustained or incurred because of or by reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the Inclusionary Units, or Developer's performance or non-performance under this Agreement, and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising from the gross negligence or willful misconduct of the City. The provisions of this section shall survive expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this section shall remain in full force and effect. Notwithstanding the foregoing, so long as the Property is subject to the terms of the Development Agreement, Section 4.9 (Indemnification of City) of the Development Agreement (and not this Section 9) shall apply and control with respect to any obligation of the Developer to indemnify, reimburse or hold harmless the City and any City Parties with respect to any Losses (as such terms are defined in such Section 4.9).

Section 10. Notices. All notices required pursuant to this Agreement shall be in writing and may be given by reputable overnight delivery service for next business day delivery or by registered or certified mail, return receipt requested, to the party to receive such notice at the addressed set forth below:

TO THE CITY:

City of San José
 Department of Housing
 200 East Santa Clara Street, T-12
 San José, CA 95113
 Attn: Inclusionary Housing

cc:

City of San José
 City Attorney's Office
 200 East Santa Clara Street, T-16
 San José, CA 95113
 Attn: Housing Attorney

TO THE DEVELOPER:

Attn: _____

Any party may change the address to which notices are to be sent by notifying the other parties of the new address, in the manner set forth above.

Section 11. Integration; Conflict with Development Agreement. The Development Agreement; this Agreement with all of its recitals and exhibits, together with the Compliance Plan; any documents to be executed for the implementation of the Developer's Inclusionary Obligation including, but not limited to, documents to be recorded against any off-site property; and any covenant recorded on Contiguous Property under Common Ownership and Control embody the agreement between City and Developer for the Residential Development's compliance with the Affordable Housing Program, the Ordinance, the Development Agreement and their respective terms and conditions. No verbal agreements or conversations with any officer, agent or employee of City prior to the execution of this Agreement, shall affect or modify any of the terms or obligations contained in this Agreement. If there is a conflict between the Development Agreement, including the Affordable Housing Program, and this Agreement, the Compliance Plan, or the Ordinance, then the Development Agreement shall control.

Section 12. Duration and Amendment of Agreement: Rescission. This Agreement shall remain in effect until the ninety-ninth (99th) anniversary date of the recording of the notice of completion for the Residential Development. If a unit becomes a For-Sale unit and, in connection therewith, a new form of Inclusionary Housing Agreement, Compliance Agreement or restrictive covenant is entered into with respect to such unit(s), then the amount of time such unit(s) was restricted as a rental Restricted Unit shall count toward the For-Sale restricted term. It may be rescinded by the City after Developer's compliance with the Inclusionary Obligation. This Agreement, and any section, subsection, or covenant contained herein, may be amended only upon the written consent of the City Manager who shall have authority to approve or disapprove minor or technical amendments on behalf of the City consistent with the Ordinance and Guidelines. If the amendment makes a substantive or material change to this Agreement it shall be effective only if the change is consistent with the Ordinance and Guidelines and following approval of the City authority that gave the First Approval for the Project and the City Manager. This Agreement shall not be amended without any necessary amendments to applicable Planning Permits and payment of any transaction fees.

Section 13. Recitals and Exhibits Incorporated. All of the above Recitals, all Exhibits, and the Compliance Plan are hereby incorporated in this Agreement and made a part hereof.

Section 14. Applicable Law. This Agreement shall be governed by the law of the State of California.

Section 15. Waivers. Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer by the City Manager to perform any obligation under this Agreement shall not operate as a waiver or release from any of its

obligations under this Agreement. Consent by the City to any act or omission by the Developer shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

Section 16. Title of Parts and Sections. Any titles of the sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

Section 17. Multiple Originals; Counterpart. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

Section 18. Recording of Agreement. The Developer shall cause this Agreement to be recorded against the Property and any other Property required for satisfaction of the compliance option in the Developer's Compliance Plan in the Official Records of the County of Santa Clara.

Section 19. Severability. In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless, be and remain in full force and effect.

Section 20. Time of Essence. Time is of the essence of every provision

hereof in which time is a factor.

Section 21. Exhibits. The following exhibits are attached to this Agreement:

Exhibit A	Legal Description of the Property
Exhibit B	Summary of the Project and Compliance Plan
Exhibit C	Affordability Restrictions

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed

Developer:

_____,

a _____

By: _____

Name: _____

Its: _____

Date: _____

If the Developer is not the sole owner, the Owner consents to the recording of the Agreement:

Owner: *[List all parties on title]*

a _____

By: _____

Name: _____

Its: _____

Date: _____

_____,

a _____

By: _____

Name: _____

Its: _____

Date: _____

Signatures must be notarized. Signatures continue on following page(s)

City of San José, a municipal corporation

By: _____

Name: _____

Its: _____

Date: _____

Approved as to form:

Senior Deputy City Attorney

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of _____

County of _____

On _____ before me, _____, Notary Public, personally
DATE NAME OF NOTARY

appeared _____
NAME(S) OF SIGNER(S)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledge to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

SIGNATURE OF NOTARY

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

EXHIBIT B SUMMARY OF PROJECT AND COMPLIANCE PLAN

This Exhibit summarizes and provides notice of the Compliance Plan executed by the Developer and on file with the Housing Department.

1.The Project's permit numbers, permit types, permit application and approval dates:

2.The total number of dwelling units: _____

3.Whether the project is anticipated to be rental or for-sale: _____

4.The Developer's Inclusionary Housing Ordinance Obligation compliance option election:

4.Any requirements that apply to other property based on the Developer's Inclusionary Housing

Ordinance Obligation compliance option election: _____

5. List of any exemptions from the Inclusionary Housing Ordinance claimed in the Compliance Plan, any evidence submitted and whether the exemption was approved by City Manager. _____

5. List of any contiguous property under common ownership or control by address and APN _____

6. List any existing structures on the property, if the residential project includes any conversion or demolition _____

8. Summarize the timetable submitted showing timing of construction. _____

EXHIBIT C

AFFORDABILITY RESTRICTION

1. Affordability Restriction (Rental).

(a) Restriction to Affordable Rent. For a period commencing upon the recordation of this Agreement and ending on the 99th anniversary of the recordation of the Notice of Completion for the Project, or, if no Notice of Completion is recorded on the Project, until the sixtieth (60th) anniversary of the recording of this Agreement, not less than five percent (5.88%) of the Total Dwelling Units shall be rented or otherwise made available at Affordable Rent to Moderate Income Households.

(b) A person or family shall be determined to be eligible (an “Eligible Household”) to rent an Inclusionary Unit if the household income does not exceed on the maximum income level for a Moderate Income Household as required for that specific Inclusionary Unit.

(c) In adjusting for unit size to determine the maximum Affordable Rent, the following adjustments to the Area Median Income shall be made based on the number of bedrooms in the Inclusionary Unit: studio - one person, one bedroom - two persons, two bedrooms - three persons, three bedrooms - four persons, and four bedrooms - five persons. In the event that the Residential Development has or obtains Low Income Housing Tax Credits, after notice to the City these adjustments for assumed household size may be modified for new tenants to reflect federal unit size adjustments based on 1-1/2 persons per bedroom consistent with Health and Safety Code Section 50053. EXHIBIT C-1 attached hereto and incorporated herein by this reference contain illustrations of the calculation of Affordable Rent for a rental unit for Moderate Income Households.

(d) Developer shall prohibit any person or family who has not been determined to be an Eligible Household at the time of taking possession, renting or occupying any Inclusionary Unit and shall cause any such person or family to vacate any Inclusionary Unit so rented or occupied. When an Inclusionary Unit is vacated, for any reason whatsoever, the Inclusionary Unit shall then again be rented or otherwise made available at Affordable Rent to Moderate Income as specified for the unit. For the purposes of this Agreement, “vacate” shall include, without limitation, departure from an Inclusionary Unit at the termination (whether at the end of a term or upon default) of the lease pursuant to which the Inclusionary Unit was occupied (“Lease”), abandonment of the Inclusionary Unit, sublease or assignment of an Inclusionary Unit (whether or not such sublease or assignment complied with the terms and conditions of the Lease).

(e) Recertification of Income. On an annual basis, Developer shall submit a report (the “Annual Report”) to the City, which contains, with respect to each Inclusionary Unit, the rental rate and income and family size of the tenant household. The Annual Report shall be based on information supplied by the tenant or occupant of each Inclusionary Unit in a certified statement on a form provided or previously approved by the City.

2. Definitions. The definitions of Area Median Income, Lower (or Low) Income Household, Very Low Income Household, and Extremely Low Income Household shall have the definitions

given these terms in Health and Safety Code Sections 50052.5, 50053, 50079.5, 50105, 50106 and 50093, as amended from time to time.

3. Default and Remedies.

(a) Non-Complying Units. In addition to and without limitation of any other rights and remedies set forth in this Agreement or otherwise available to any party legally entitled to enforce this Agreement, in the event of any Default (as defined below), after thirty (30) day notice by City to Developer, and Developer's failure to cure within such thirty (30)-day period City shall have the right to lease and Developer shall lease to City on demand for a rental of \$1.00 per Inclusionary Unit per year any and all of the "Non-Complying Inclusionary Units" (as defined below) at such time as the Non-Complying Inclusionary Unit(s) is vacated. "Non-Complying Inclusionary Units" shall mean an Inclusionary Unit which is occupied and/or leased in violation of this Agreement. Determination of such a violation may be based on information provided in the Annual Report or determined by City in its reasonable discretion based on information otherwise available to it. Notwithstanding any term or condition of the lease under which the City leases a Non-Complying Inclusionary Unit pursuant to this subsection, Developer hereby consents to and grants City the right to assign such lease or sublet such Inclusionary Unit(s) to a Moderate Income Household, as appropriate, at Affordable Rent or to any non-profit housing provider (a "Provider") in the community for \$1.00 per year on the condition that such Provider subleases such Inclusionary Unit(s) or assigns such lease(s) to Moderate Income Household, as appropriate, at Affordable Rent. If the City assigns or sublets to any Provider, the Developer hereby consents to and grants such Provider the right to assign such lease or sublet such Inclusionary Unit to any Eligible Household at an Affordable Rent. If the City leases any Inclusionary Unit(s) or a Provider subleases any Inclusionary Unit(s) or is the assignee of any lease(s) from the City, the City or Provider, as the case may be, to the extent necessary to ensure compliance with this Agreement, shall sublease such Inclusionary Unit(s) or assign such lease(s) to any Eligible Household at Affordable Rent. Any rent paid under such a sublease or assignment shall be paid to the Developer after the City or Provider, as the case may be, has been reimbursed for any expenses incurred by it in connection with exercising the rights and remedies set forth in this subsection; provided, that if the Developer is in default under any loan documents in connection with the financing of the Property or any improvements thereon, such rent shall be paid to the party legally entitled thereto.

(c) Excess Rent. In the event that and to the extent that the Developer receives rents or other payments from the operation of the Inclusionary Units or other improvements constructed on the Property in excess of what is permitted to charge and receive pursuant to this Agreement, after thirty (30) day notice by City to Developer, Developer agrees and covenants to pay to the City the full amount of such excess immediately on demand by the City. Developer and the City agree and intend that the payment of such excess, absent other remedies described in this Agreement to ensure for the term hereof that rents or other payments do not exceed those Developer is permitted to charge and receive pursuant to this Agreement, shall not alone be an adequate remedy to accomplish the purposes of this Agreement

(d) All Remedies Available and Cumulative. In the event of any breach of any of the covenants or restrictions set forth in this Exhibit C (a "Default"), the City or members of the community (as defined in the Health and Safety Code) shall have the right to exercise all the rights

and remedies, and to maintain any action at law or suits in equity or other real property proceedings, including without limitation, specific performance, to enforce the covenants and restrictions and the curing of any breach or violation thereof. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of the City to enforce the provisions hereof in the future for any continuing or new breach or violation of any of the covenants or restrictions contained in this Agreement. All rights and remedies, including without limitation those set forth in paragraphs 3(a) through (c) above, of any party legally entitled to enforce this Agreement shall be cumulative and the exercise of any such right or remedy shall not impair or prejudice and shall not be a waiver of the right to exercise any other such rights and remedies.

4. **Reporting.** In addition to the Annual Report, Developer shall provide all information reasonably requested by the City (not more frequently than once per calendar quarter) with respect to the number of Units in the Property and the income levels of the persons or families renting or otherwise occupying the Units.

5. **Restriction to be Attached.** Developer shall attach a copy of this Exhibit C to any lease or purchase and sale contract with respect to any Inclusionary Unit.

6. **Transfer of Inclusionary Units.** During the term of this Agreement, Developer must give written notice to the City at least 90 days in advance of any sale, agreement to sell, assignment, conveyance, lease (other than the rental or lease of Inclusionary Units to Eligible Households), or transfer of the Inclusionary Units or any part thereof, including the sale of any general partnership interests, the removal of any general partner, or any substantial change in operational or management control over the Inclusionary Units.

7. **Monitoring.** The City shall have the right to take such actions to monitor compliance with this Agreement as it deems necessary, including but not limited to reasonable requests for documents.

8. **Monitoring Fees.** Developer shall pay annual monitoring fees to the City in advance on or prior to July 1 consistent with the amount set forth in the City's Schedule of Fees and Charges. As of 2020-2021, the fee is \$41.65 per Inclusionary Unit to City.

9. **Property Damage or Destruction.** If any of the Inclusionary Units or access thereto is damaged or destroyed, Developer must notify the City within 30 days and must at its own cost and expense, repair or restore the Inclusionary Units. Such work shall be commenced within 120 days after the damage or loss occurs and shall be completed within one year thereafter. All insurance proceeds collected for such damage or destruction shall be applied to the cost of such repairs or restoration. In the event that the Inclusionary Units are not rentable during this time, the term of this Agreement shall be extended by the period of time that any of the Inclusionary Units were not rented to and occupied by eligible households.

10. **No Discrimination.** The Developer covenants and agrees for itself, its heirs, successors, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases

are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the Property. The foregoing covenants shall run with the land.

All deeds, leases, and contracts for the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, or any portion thereof made or entered into by Developer, its successors or assigns, shall contain therein the following language:

(a) In Deeds:

"The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

(b) In Leases:

"The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions that there shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased."

(c) In Contracts:

"The contractor herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through it, and this contract is made and accepted upon and subject to the conditions that there shall be no discrimination against or

segregation of any person or of a group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the property herein transferred nor shall the contractor or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees in the Property. The foregoing provisions shall be binding upon and shall obligate the contractor and any subcontracting parties, successors, assigns and other transferees under the contract."

EXHIBIT C-1

The following hypothetical illustrates the calculation of Affordable Rent **for a Moderate Income Households** (as defined in the Ordinance) who are **Renting** a Moderate Income Inclusionary one-bedroom unit with an assumed family size of 2 persons in Santa Clara County.

Assumptions.

1. Inclusionary Unit to be made available to Moderate Income Households.
2. Family Size = 2 Persons (for purposes of this example)
3. Person or Family need not have the maximum income for a Person or Family in the income category (adjusted for family size).
4. Electricity charges are separately metered and directly billed to the tenants by PG&E. A reasonable allowance for such charges based on the Utility Allowance Schedule published by the County of Santa Clara Housing Authority ("Allowance") is deducted.

As of April 2020, per 25 California Code of Regulations ("CCR") Section 6932, median income for a family of 2 is \$113,300 ("Area Median Income adjusted for family size") and the maximum income level for a Moderate Income Household with a family size of 2 in Santa Clara County is \$135,900 (100% of the Area Median Income adjusted for family size).

Pursuant to 25 CCR Section 6918, rent (for the purposes of this Exhibit defined as "Rent") includes, among other things, payment for use or occupancy of a housing unit and charges or fees charged or passed through by the landlord other than security deposits). Pursuant to Section 50053 of the Health and Safety Code and this Restriction, the Rent paid by a Moderate Income Household for a Moderate Income Inclusionary Unit shall not exceed 30% of 100% of the Area Median Income adjusted for family size.

CALCULATION OF RENT CHARGEABLE:

\$135,900	[100% of the area median income adjusted for family size (2 persons)]
X .30	[Rent cannot exceed 30% of 100% of area median income]
\$40,770.00	

\$ 3,397.50	divided by 12 [to calculate the maximum <u>monthly</u> Rent]
-\$ 74.00	[Assumed allowance for an all electric 1 bedroom apartment.]

\$ 3,323.50 [Maximum Rent after reasonable allowance for electric charges.]

As this hypothetical illustrates, as of April 2020, no Moderate Income Household with a family size of 2 that pays its own electric bill should be charged or pay Rent in excess of \$3,397.50 per month minus less the approved utility allowance; this amount may be adjusted as the CCR Sections above are amended or the reasonable allowance amount is adjusted.

